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No.

In The

Supreme Court of the United States

KENNETH PIETROWSKI, WILLIAM BURRITT, WILLIAM COONS, DEBORAH DAVIS, CHARLES HOBBS, CHARLES MADDALOZZO, AND JOHN WILLIAMS,

Petitioners,

v.

SALLY L. CONKRIGHT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This litigation, which began in 1999, involves over 100 plaintiffs – each of whom is an employee or former employee of the Xerox Corporation ("Xerox"). Plaintiffs allege that Xerox and other respondents' use of an illegal accounting method has deprived them of substantial pension benefits. In 2006, the Second Circuit agreed with plaintiffs. *Frommert et al. v. Conkright et al.*, 433 F.3d 354 (CA2 2006) (holding that respondents had violated ERISA's notice and anti-cutback provisions through use of a "phantom account").

Since the inception of the litigation, Xerox has from time to time initiated mass layoff programs wholly unrelated to this pending litigation; in connection with these mass layoffs, all terminated employees were offered a severance package in exchange for signing a boilerplate release of legal claims. This petition is brought by 7 plaintiffs who signed this boilerplate release.

The Question Presented is:

In determining whether an individual has "knowingly and voluntarily" waived a claim to pension benefits by signing a boilerplate release, does ERISA require consideration of the specific circumstances under which the individual signed the release?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs-Appellees-Petitioners:

Kenneth W. Pietrowski, William M. Burritt, William F. Coons, Deborah J. Davis, Charles Hobbs, Charles J. Maddalozzo, and John A. Williams

Plaintiffs-Appellees:

Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo, Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. Mccoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. Mcmillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Zabinski, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Brenda H. Mcconnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Sr., Claudette M. Long, Dale

Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Crater, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, Crystal Thornton, Charles R. Drannbauer, Janice Ross Heiler, Thomas F. Mcgee, Vincent G. Johnson, F. Colt Hitchcock, Ronnie Tabak, Martha Lee Taylor, Charles Willette and Richard J. Glikin,

Defendants-Appellants-Respondents:

Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Pension Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan and Xerox Corporation, A New York Corporation,

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Kenneth Pietrowski, William Burritt, William Coons, Deborah Davis, Charles Hobbs, Charles Maddalozzo, and John Williams (collectively "the Release Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for Second Circuit that their claims in this litigation were extinguished when they signed general releases in connection with the termination of their employment at Xerox.

OPINIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a-22a) which gives rise to this petition is published at 535 F.3d 111. On August 7, 2008, the Release Petitioners filed a petition seeking rehearing and rehearing *en banc*. The order denying that petition (Pet. App. 60a-61a) is unpublished. The order and opinion of the district court holding that the releases at issue were unenforceable as a matter of law is published at 472 F.Supp.2d 452.

JURISDICTION

The Second Circuit issued its opinion on July 24, 2008. (Errata were filed on October 6, 2008). It denied a timely petition for rehearing and rehearing *en banc* (Pet. App. 60a-61a) on September 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Income Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, provides in pertinent part:

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds *** that the continued well-being and security of millions of employees and their dependents are directly affected by [benefit] plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; *** that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; *** and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

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STATEMENT OF THE CASE

1. Few statutes are more significant to a greater number of Americans than ERISA. At recent count, ERISA pension plans held several trillion dollars in

assets,[1] while ERISA welfare plans provide health insurance for over 132 million people.[2] In the words of Congress, "[t]he primary purpose of [ERISA] is the protection of individual pension rights."[3]

The crux of the dispute in this litigation is that respondents violated ERISA when the Xerox Retirement Income Guarantee Plan (the "Xerox Plan") dramatically under-calculated pension benefits due to *rehired* employees. In 1999, many affected Xerox employees or former employees filed suit against respondents in the District of Connecticut; in 2000 the

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[1] *See* John MacDonald, *"Traditional" Pension Assets Lost Dominance a Decade Ago, IRAs and 401(k)s Have Long Been Dominant*, EMP. BENEFIT RES. INST., February 3, 2006, *available at* http://www.ebri.org/pdf/publications/facts/fastfacts/fastfact020306.pdf.

[2] *See* William Pierron and Paul Fronstin, *ERISA Pre-emption: Implications for Health Reform and Coverage*, EMP. BENEFIT RES. INST., February 2008, p. 11, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf.

[3] H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639 (emphasis supplied). *See also* 120 Cong. Rec. 29,935 (1974) (ERISA is a "pension bill of rights") (statement of Sen. Javits); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) (the purpose of ERISA is to "promote the interests of employees and their beneficiaries in employment benefit plans"); Jay Conison, *Suits For Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 3 (1992) ("The central policy of * * * ERISA * * * is that employees should receive the pensions and other benefits they were led to believe they would get."). *See generally* James A. Wooten, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 A POLITICAL HISTORY (University of California Press 2005) (discussing history and purpose of ERISA).

matter was transferred to the Western District of New York (the "Benefit Litigation").

This is the second time the litigation has reached the Second Circuit. In 2005, after an adverse district court ruling, the Benefit Litigation plaintiffs appealed to the Second Circuit to determine whether the Xerox Plan's use of a "phantom account" offset to calculate plaintiffs' benefit entitlement was permissible under ERISA. On January 6, 2006, the Second Circuit held that Xerox had violated ERISA's notice and anti-cutback provisions through use of a "phantom account" method of calculating benefits. *Frommert v. Conkright*, 433 F.3d 254, 257 (CA2 2006) ("Frommert I"). The matter was remanded to the district court to determine, *inter alia*, the proper method for calculating plaintiffs' pension benefits. *Id.*

On July 24, 2008, the Second Circuit issued its second opinion in the Benefit Litigation, which gives rise to this petition. Pet. App. 1a-22a. The court of appeal's opinion addressed two issues: (1) did the district court select an appropriate methodology for calculation of the plaintiffs' pension benefit entitlement (the "methodology issue")? Pet. App. 9a-15a. And (2) did the district court correctly conclude that the execution of boilerplate release forms (as part of a reduction in Xerox's workforce that was wholly unrelated to the Benefit Litigation) did not extinguish pension claims in this litigation (the "release issue")? Pet. App. 15a-22a. As explained herein, the Question Presented pertains only to the release issue. The pertinent facts are as follows:

2. Xerox periodically terminates large groups of employees pursuant to voluntary reduction in force

("VRIF") or involuntary reduction in force ("IRIF") programs. These mass layoffs are governed by Xerox policy, which provides for "salary continuance" (*i.e.*, severance) in consideration for the affected employee signing a "general release" of claims against Xerox.[4] The amount of severance given to each employee who is terminated as part of a VRIF or IRIF varies only with the salary level and seniority of that employee. The VRIF/IRIF general release, a form used for *all* employees participating in force reduction programs, is a boilerplate release intended to extinguish claims arising from employment termination.[5]

The Release Petitioners are among a group of approximately twenty plaintiffs who (while the Benefit Litigation was pending) signed a general release in connection with a workforce reduction. The general release forms signed by the Release Petitioners make no specific mention of the Benefit Litigation.[6] And the

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[4] *Defendants' Local Rule 56 Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried*, ¶ 11 (Pet. App. 77a) ("Defendants' Rule 56 Statement"). This document was included in the record before the court of appeals, A1045-A1050. (Hereinafter, all references to pages in that record will take the form of "A____".)

[5] Pet. App. 42a-43a (the documents at issue are "standard release forms given to all employees who choose to participate in a RIF, and are aimed at foreclosing the possibility of the employee's later assertion of claims relating to his termination in the RIF **** [T]here is no suggestion that plaintiffs' claims in this case***were being waived.").

[6] Pet. App. 42a (where the district court notes that the general releases "omi[t] any mention" of the Benefit Litigation and "do not appear to have anything to do with this litigation"). *See, e.g.*, the

existence of the Benefit Litigation had absolutely no effect on the amount of severance offered to the Release Petitioners. Indeed, respondents candidly admit they had no involvement in the force reduction severance/release process.[7]

3. In the district court, former counsel for the Release Petitioners sought a determination that, as a matter of pure contract interpretation, the general releases were unenforceable against all Benefit Litigation plaintiffs.[8] Attention was focused on language in the general release that appeared facially contradictory.[9]

Agreeing with former counsel for the Release Petitioners, the district court determined that the ambiguity of the releases' language precluded their enforceability against *all* Benefit Litigation plaintiffs.

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general release form of Release Petitioner Charles Hobbs, signed December 7, 2005 ("Hobbs Release"), Pet. App. 62a-67a. The releases of the other Release Petitioners were also before the court of appeal, but are in pertinent part identical to Mr. Hobbs' release.

[7] Pet. App. 77a (Defendants' Rule 56 Statement, ¶12).

[8] Pet. App. 36a ("Plaintiffs contend that the releases are ambiguous in certain respects, and therefore unenforceable.").

[9] Paragraph three of the general release purports to release "any and all claims," while paragraph five indicates that the consideration for the release was "in addition to anything of value to which I am entitled by law or Xerox policy." Pet. App. 38a-39a (reciting release language); *see also* Hobbs Release, Pet. App. 62a-67a. Thus, paragraph three seemingly waives—while paragraph five seemingly preserves—anything to which an employee is entitled, including any claims that he or she had asserted in the Benefit Litigation. Pet. App. 38a-40a.

In light of this legal determination, no individualized inquiry was conducted regarding the individual circumstances under which each Release Petitioner had signed the general release form. Respondents appealed, *inter alia*, this particular ruling by the district court. Specifically, respondents argued that the language in the release was a "plain and simple statement [that] puts sophisticated and unsophisticated litigants on an equal footing, adds certainty to * * * settlement negotiations and agreements, and adequately notifies plaintiffs that they are releasing all possible claims."[10]

After briefing and argument, the Second Circuit reversed the district court on the release issue. Pet. App. 22a. ("As the District Court's interpretation of the release forms is incorrect, it cannot stand."). The court of appeals did not have any individualized facts before it regarding the circumstances under which each releasor signed the release. Yet, instead of remanding the case to the district court, the court of appeals categorically held that the general release extinguished the claims in this litigation of all who had signed it—except for those plaintiffs who specifically modified their form prior to execution. Pet. App. 22a. ("Unless the release form at issue specifically exempted this litigation as noted above, the releases signed by certain Plaintiffs-Appellees are enforceable.").[11] The Second Circuit's ruling rested

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[10] Respondents' Brief Before the Second Circuit, p. 20, *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008).

[11] A few plaintiffs modified the general release to explicitly "carve-out" the Benefit Litigation. Pet. App. 15a, n.3. The Second Circuit

entirely on facts true of the releasor group as a whole, *i.e.*, all releasors were (formerly) represented by the same lawyer, had the same amount of time to review the release, and had received salary continuance to which they were not otherwise entitled. *Id.*

The Release Petitioners timely filed a petition for rehearing and rehearing *en banc*. On September 25, 2008, the Second Circuit denied the request for rehearing and rehearing *en banc*. Pet. App. 60a-61a.

This petition followed.

REASONS FOR GRANTING THE WRIT

Even respondents must concede that the Question Presented is one of exceptional importance. If not, they will need to repudiate the claims of their own *amicus*, the Business Roundtable, who informed the court of appeals below that the release issue presented "an issue of fundamental concern."[12]

Prior to the Second Circuit's decision below, there was broad consensus that the release of ERISA claims imposed upon the courts a duty to strictly scrutinize whether the releasing party acted voluntarily and with the knowledge that he or she was giving up the pension claims at issue. *Sharkey v. Ultramar Energy*

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upheld the district court's determination that such "carve-out" releases did not bar Benefit Litigation claims. *Id.*

[12] *See* Brief of the Business Roundtable as *Amicus Curiae* before the Second Circuit in Support of Defendant-Appellants Sally Conkright, *et al.*, at 9, *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008) ("Roundtable Br.").

Ltd., Lasmo PLC, Lasmo (A UL Ltd.), 70 F.3d 226, 231 (CA2 1995) (close scrutiny required to ensure ERISA waiver is "knowing and voluntary"). Such strict scrutiny required more than a careful reading of the release agreement; it required individualized fact-finding into the circumstances of a particular plaintiff's signing of a release. *See, e.g., Finz v. Schlesinger*, 957 F.2d 78, 81 (CA2 1992) ("validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims"); *Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (CA8 1990) (listing the individual circumstances a court "must consider" when evaluating an ERISA release).

In deciding the Question Presented, the court of appeals departed from the well-settled individualized standard and created a new "group" standard for assessing the enforceability of a release of ERISA claims. This new standard cannot be reconciled with ERISA. It undermines the objective of carefully scrutinizing pension waivers, which is to ensure that a particular individual actually knew that he or she was relinquishing pension benefits earned over a lifetime—the very benefits ERISA was enacted to protect. *See* 29 U.S.C. § 1001 (ERISA's purpose is to provide "safeguards" and "minimum standards" to ensure the "equitable character" of benefit plans). Application of this standard will be often be outcome determinative, as it was in this case. Further review by this Court is warranted.

I. THE QUESTION PRESENTED IS ONE OF EXCEPTIONAL IMPORTANCE.

1. A release is the relinquishment of a claim (whose value is often uncertain) in return for something of value. Because a release may forever bar an otherwise meritorious claim, courts are careful to ensure—in any context—that the releasing party relinquished the claim knowingly and voluntarily. *Jordan v. Guerra*, 23 Cal.2d 469, 476 (Cal. 1943) (enforcement of release "demands * * * a full understanding on the part of the person injured as to his legal rights") (internal quotation and citation omitted).

This requirement is of particular importance in the ERISA setting where Congress intended that pension benefits enjoy heightened protection; accordingly, waivers of ERISA pension claims are strictly scrutinized. *See, e.g., Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 587 (CA1 1993) ("heightened scrutiny [is] applied to waiver of rights accrued in ERISA pension plans"); *Sharkey*, 70 F.3d at 23 (close scrutiny required to ensure ERISA waiver is "knowing and voluntary").[13]

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[13] As this Court has itself noted, ERISA is modeled on trust law. *See, e.g., Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law."). *See also* John H. Langbein, *What Erisa Means By "Equitable": The Supreme Court's Trail Of Error In Russell, Mertens, And Great West*, 103 COLUM. L. REV., 1317, 1321-38 (2003) (describing ERISA as a "regime of federal trust law"); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1108 (1988)("The drafters of ERISA intended to 'apply rules and

2. Prior to the decision below, the courts of appeals (including the Second Circuit) had widely recognized that such enhanced scrutiny requires analysis of all salient factual circumstances of the signing of a release; that legal standard is often called the "totality of the circumstances" test.[14] *Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1367 (CA2 1991). A non-exhaustive list of factors considered is:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff

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remedies similar to those under traditional trust law to govern the conduct of fiduciaries.'"). It is black-letter trust law that "in the case of a release of a fiduciary, special requirements are set by the courts." G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 943, at 475-80 (rev. 2d ed. 1982).

[14] The individualized "totality of the circumstances" test is also used in connection with assessing waivers made of other remedial rights, such as the rights conferred under federal anti-discrimination statues. In describing the quality and aim of the test, the Third Circuit has explained:

> [T]he inquiry into the validity of a release of discrimination claims *does not end with the evaluation that would be applied to determine the validity of a contract*. In light of the strong policy concerns to eradicate discrimination in employment, a review of the totality of the circumstances, *considerate of the particular individual* who has executed the release, is also necessary.

Coventry v. U.S. Steel Corp., 856 F.2d 514, 522-523 (CA3 1988) (emphasis supplied). *See also Torrez v. Public Service Co. of New Mexico, Inc.*, 908 F.2d 687, 690 (CA10 1990) ("While evaluation of the language of the contract is necessary to determine the validity of the waiver of discrimination claims, our inquiry cannot end there.") Such reasoning applies with equal force to ERISA.

> had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney * * * and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. See also Leavitt, 921 F.2d at 162.

This well established standard is self-evidently an individualized one designed to apply to *single* releases that come before the court. In other words, it prompts a plaintiff-specific inquiry into the facts underlying the signing of the purported release by a specific plaintiff. *See, e.g., Smart v. Gillette Company Long Term Disability Plan*, 70 F.3d 173, 181-182 (CA1 1995) (release inquiry is "fact-intensive" and "every case is *sui generis*")[15]; *Finz v. Schlesinger*, 957 F.2d 78, 82 (CA2 1992) ("an *individual* can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver is made knowingly and voluntarily.") (internal quotations omitted) (emphasis supplied).

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[15] *See also Smart*, 70 F.3d at 181:

> Generally, no single fact or circumstance is entitled to talismanic significance on the question of waiver. Only an inquiry into the totality of the circumstances can determine whether there has been a knowing and voluntary relinquishment of an ERISA-protected benefit. For that reason, every case is *sui generis*.

3. In the instant case, the litigation involves a *group* of over twenty releasors, each having signed near-identical boilerplate releases in conjunction with mass layoffs, but otherwise whose differentiated individual circumstances were largely unknown to the court of appeals. As explained above, the district court below had found the language of the release to be so unclear that it concluded as a matter of law that such a release could not bar the claims of *any* Benefit Litigation plaintiff.[16] Indeed, the Release Petitioners' trial counsel had not introduced individualized evidence; he argued that the releases were unenforceable by dint of the release's language, *no matter what the individual circumstances of the signatory plaintiff*:

> [The] essential relief sought by plaintiffs' motion is not a summary judgment but rather a judgment declaring that, as a matter of law, the Xerox general release is unenforceable * * * * The key point is the proper application and interpretation of [a particular provision] of the release.[17]

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[16] Pet. App. 40a ("the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance****[and] create some doubt about whether the release truly covered" the Benefit Litigation claims); Pet. App. 45a ("the ambiguity of the scope of the release***should not be resolved against plaintiffs.").

[17] A766 (Plaintiffs' Memorandum of Law in Further Support of the Plaintiffs' Motion Regarding Open Issues and in Opposition to the Defendants' Cross-Motion for Summary Judgment, p. 23).

The Second Circuit did not agree with the trial court that the release language was ambiguous; it found that the relevant language "provided only that the consideration for the release, *i.e.*, the salary continuance, did not replace any benefits, including pension benefits, to which the employee was already entitled." Pet. App. 20a. Yet the clarity of the agreement's language is only one part of the "totality of the circumstances" test; application of that standard requires individualized determinations about the *remaining* salient circumstances of the release signing of each Release Petitioner.[18] The court of appeals conducted no such determination. Nor could it have; the record was barren of particularized evidence.

4. Instead, the court of appeals effectively constructed a new "group" standard for evaluation of the validity of ERISA releases where, when evaluating the enforceability of a large number of form releases, it determined that sufficient general facts (*i.e.*, common language in the boilerplate document, common representation by the same counsel, etc.) moots inquiry into the particular circumstances

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[18] *Cf. Puentes v. United Parcel Service, Inc.*, 86 F.3d 196, 198 (CA11 1996) (in non-ERISA release case using similar "totality of circumstances" factors, court reversed summary judgment based on individualized factors beyond clarity of release language and releasors' business experience.); *Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816, 820 (CA11 1998) ("The district court should not have summarily adopted a decision from another case, *even though it dealt with the exact same release form*. Each factor should be independently analyzed.") (emphasis supplied).

attending each individual releasor's execution of the release.[19]

Indeed, no difference among the Release Petitioners was considered by the Second Circuit's new group standard. Such is consistent with the philosophy urged upon the court by respondents and their *amicus*. In its *amicus* filing below, the Business Roundtable explained that the language of the release was "clear and unequivocal" to the extent that "[i]f such language 'were found to be an inadequate predicate for an effective waiver," the courts 'would be hard pressed to

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[19] The distinction between the individualized standard and the group standard is best illustrated by an example:

Assume two Releasors, both of whom are salaried employees represented by counsel, sign general releases. Releasor A is a Xerox employee who has never reviewed contracts during her professional tenure at Xerox; who knows that another plaintiff recently signed a modified release "carving-out" the Benefit Litigation yet still received full severance; who has received noncommittal answers from her lawyer about the effect of the release on his Benefit Litigation claim; who has heard from a Human Resources employee at Xerox that the general release "has nothing to do with the Benefit Litigation lawsuit"; and who knows of co-employees who are not members of the Benefit Litigation and who were offered the exact same severance/release deal.

Releasor B served as in-house counsel at Xerox; knows of another Benefit Litigation plaintiff whose attempt to insert a "carve-out" of the Benefit Litigation into the general release was rejected; who heard from Human Resources that the general release "definitely affects the Benefit Litigation"; and who was informed by her lawyer that the release certainly bars participation in the Benefit Litigation. Those distinctions are relevant under the old individualized standard; they are irrelevant under the new group standard.

prescribe an adequate one.'" Roundtable Br. at 14, quoting *Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 452 (CA3 1988). Put another way, the winning argument was that form releases affecting large numbers of laid off workers—which modern corporations routinely rely upon as a part of mass workforce reductions—should trump individualized process.

Respondents and their *amicus* have successfully persuaded the Second Circuit to undertake a stark shift in existing jurisprudence that contravenes ERISA's primary aim of protecting pension benefits for working Americans. Given the "millions of employees across the Nation [who] have entered into release agreements with their employers," Roundtable Br. at 10, this shift presents an issue of extraordinary importance—particularly in today's economic climate. Further review is warranted.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED.

1. It is settled law that determination of whether a release of pension benefits was "knowing and voluntary" must be done pursuant to an individualized inquiry. *See* Section I, *supra*. This is not surprising given the text, history, and purpose of the ERISA statute.[20]

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[20] 29 U.S.C. § 1001(a) explicitly provides that the purpose of ERISA is to provide "safeguards" and "minimum standards" to ensure the "equitable character" of benefit plans. An individualized inquiry, and the heightened protection it affords, is consistent with the statute's own recited aim. The more searching an inquiry, the smaller the risk that an employee may unknowingly waive his right to a pension. A group standard, in

In deciding the Question Presented, the Second Circuit reached the opposite conclusion. This case is an ideal vehicle for resolution of the Question Presented because its resolution by the court of appeals below was outcome determinative. And, as explained below, it was outcome determinative for the very same reasons that its application will likely be so in future cases.

2. Mass layoffs are a fact of modern life. But the circumstances of the terminated individuals differ greatly. Such differences are unquestionably relevant when determining whether a given employee knowingly and voluntarily waived his or her pension benefits. The decision below illustrates precisely how the application of a group standard ignores crucial differences among the affected individuals and, in so doing, uses an invalid proxy to resolve the outcome determinative question—whether each individual understood that he or she was waiving his or her claim to pension benefits. The following three examples are illustrative:

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contrast, may have the benefit of expediency, but it makes more difficult the task of accurately determining whether an individual releaser in fact knowingly and voluntarily waived pension benefits. An expedient but less precise standard for whom the cost of imprecision is an increased chance that employees will unknowingly relinquish benefits decreases, rather than increases, the "equitable character" of pension promises, and thus cannot possibly be squared with ERISA's remedial purpose. Indeed, some commentators have gone even further, invoking ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), to urge that a strict reading of ERISA's text suggests *any* waiver of accrued pension benefits is *per se* barred. Albert Feuer, *When are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773 (2005).

3. First, the group standard does not take into consideration the specific interaction between the party signing a release and individuals at the company who drafted the document. This case is a paradigmatic example: the Release Petitioners (as is customary in mass layoffs) did not all work in the same division, office, or even State. As such, different Release Petitioners would have spoken to different Human Resource personnel to shore up their understanding of the release's content and effect. The information conveyed to each Release Petitioner (and by whom) are important facts that would be brought to light through an individualized inquiry. Such details are highly relevant in assessing whether each Release Petitioner actually knew that he or she was waiving the pension benefits at issue in the Benefit Litigation.

Second, the group standard does not take into consideration other contextual facts. Again, this case illustrates the danger of such omission. Several Release Petitioners signed their releases only *after* (1) other Benefit Litigation plaintiffs inserted "carve-outs" of the litigation into their releases, and (2) after Xerox had accepted those "carve-out releases" *without* a corresponding reduction in severance consideration.[21]

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[21] For example, plaintiff Charles Zabinski executed a release, with a "carve-out" of this litigation, on September 14, 2005. Pet. App. 70a, ¶5. (Mr. Zabinksi's "carve-out" release was before the court of appeal at A1043-44.) Pursuant to Xerox policy, Zabinski received a salary-continuance severance based on his "length of service," with no input from the Xerox Plan Administrator regarding Zabinski's lawsuit. Defendants' Rule 56 Statement, Pet. App. 77a, ¶¶11-12. Zabinski's severance was not reduced (nor has Xerox ever suggested it was) because he inserted a lawsuit carve-out. *Id.* Several Release Petitioners, such as Charles Hobbs and

Had Xerox believed that the Benefit Litigation *was* covered by the general language of the release, then presumably it would have reduced by some amount the severance provided to the "carve-out" releasors. But Xerox did not do so. Release Petitioners who were *in fact* aware that the Benefit Litigation carve-out language had previously been accepted by Xerox without a corresponding reduction in severance may have concluded that *Xerox itself* interpreted the general release to *not* encompass the Benefit Litigation. Such an understanding would not be a "knowing and voluntary" waiver of an ERISA claim. The court of appeal's resolution of the Question Presented prevents inquiry into such critical facts.

Third, the group standard does not take into consideration the specific education and business experience of individual releasors. This information is of critical importance in determining the particular understanding of each individual: a release readily comprehensible by a division manager might not have been understood by an administrative assistant. Again, this case illustrates the critical importance of such an inquiry. Here, federal judges could not agree about which claims were definitely encompassed within the scope of the release. *Compare* Pet. App. 40a (where the district court concluded that "the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance"), *with* Pet. App. 22a ("the District Court's interpretation of the release forms is incorrect [and] cannot stand.").

Kenneth Pietrowski, signed their releases after Zabinski. *See, e.g.*, Hobbs Release, Pet. App. 67a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2008

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007
Docket No. 07-0418-cv

[Decided: July 24, 2008]
Errata October 6, 2008

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE, THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES

ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,
Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE

M. BECKER, XEROX CORPORATION)
PLAN ADMINISTRATOR, XEROX)
CORPORATION RETIREMENT INCOME)
GUARANTEE PLAN, AND XEROX)
CORPORATION, A NEW YORK CORPORATION,)
Defendants-Appellants,)
)
XEROX CORPORATION,)
Defendant.)
)

[Argued: June 19, 2008]

Before : STRAUB and RAGGI, *Circuit Judges*, and SESSIONS, *District Judge*.*

Appeal from a January 24, 2007 order of the United States District Court for the Western District of New York (David G. Larimer, *Judge*) complying with our January 6, 2006 decision to remand the case to the District Court in order to craft a remedy to calculate Plaintiffs-Appellees' pension benefits in light of the violations we identified of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. We conclude that the District Court crafted a remedy consistent with our decision, applicable law, and the terms of the pension plan at issue. However, we also conclude that the District Court erred in refusing to enforce the release forms signed by several Plaintiffs-Appellees in this litigation.

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* The Honorable William K. Sessions III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ROBERT H. JAFFE (Mark B. Watson, Robert H. Jaffe & Associates, Springfield, New Jersey; George A. Schell, Schell & Schell, Fairport, New York; John A. Strain, Rodondo Beach, California, *on the brief*), Robert H. Jaffe & Associates, Springfield, New Jersey, *for Plaintiffs-Appellees*.

BRENDAN S. MAHER, Stris & Maher LLP, Dallas, Texas, *for Plaintiffs-Appellees*.

MARGARET A. CLEMENS, Nixon Peabody LLP, Rochester, New York, *for Defendants-Appellants*.

Maria Ghazal, Business Roundtable, Washington, D.C.; Jeffrey A. Lamken, Rachel M. McKenzie, Baker Botts LLP, Washington, D.C.; Allyson N. Ho, Baker Botts LLP, Dallas, Texas, *for Amicus Curiae Business Roundtable*.

STRAUB, Circuit Judge:

Plaintiffs-Appellees asserted claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against their current or former employer, Xerox Corporation ("Xerox"),[1] the pension plan administered for the benefit of its employees, and various individuals

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[1] Early in this litigation, the District Court dismissed Xerox as a party, and Plaintiffs-Appellees did not challenge this dismissal in their appeal. *See Frommert v. Conkright*, 433 F.3d 254, 256 n.2 (2d Cir. 2006).

associated with the administration of that plan. On remand from our first decision in this litigation, *see Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006), the District Court crafted a remedy to address the ERISA violations we had identified and concluded that the release forms signed by several Plaintiffs-Appellees did not bar their ERISA claims, *see Frommert v. Conkright*, 472 F. Supp. 2d 452, 456–59 (W.D.N.Y. 2007). Defendants-Appellants challenge both aspects of the District Court's decision. For the reasons set forth below, we reject Defendants-Appellants' first challenge and agree with the second. Accordingly, we vacate a portion of the District Court's order and remand the case to the District Court for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

We presume familiarity with the facts and procedural history of this case as set forth in our prior decision, *see Frommert*, 433 F.3d at 257–62, and we repeat them here only as relevant to the issues presented in this appeal. In that decision, we concluded that Defendants-Appellants had impermissibly amended the ERISA plan at issue through their method of determining retirement benefits for those beneficiaries who had previously left the company only to be rehired later. *Id.* at 264–68. When these beneficiaries left Xerox, they all received lump-sum distributions of their then-accrued pension benefits. *Id.* at 257.

The pension benefits of those who were subsequently rehired by Xerox were governed by a set

of ambiguous provisions in the pension plan documents. The 1989 Xerox Retirement Income Guarantee Plan ("RIGP" or "Plan") provided that, "[i]n the event any part or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, . . . and such member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution." 1989 RIGP § 9.6. The 1997 version of the Plan provided both that "[n]o credit shall be given [to a participating employee] for any period with respect to which a lump sum payment has been made . . ." and that "Credit for Years of Participation preceding [such a payout] will be reinstated" in the event that such an employee returns to Xerox." *Frommert*, 433 F.3d at 260. Thus, in determining these employees' benefits, the plan administrator was required to account, in a manner unspecified to employees, for both an employee's total years of service at Xerox and the fact that the final benefits must be "offset by" an amount "attributable" to a prior lump sum distribution.

The plan administrator resolved this difficulty by utilizing a so-called "phantom account" offset mechanism. The phrase "phantom account" refers to the calculation of the current value of the employee's prior, lump-sum distribution by adjusting that amount for "hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been left in [the employee's] account[]" instead of being distributed to the employee upon first leaving Xerox. *Id.* at 259 (quoting 1995 "Benefits Update"). In estimating the pension benefit to which that employee would be entitled upon his or her future retirement

(and thus second separation) from Xerox employment, the plan administrator would both account for the employee's total years of service and deduct an amount based on the prior, lump-sum distribution, as augmented by the "phantom account" offset method. *See id.* at 259–61.

In our first decision, we concluded that the "phantom account" offset mechanism constituted a "retroactive cut-back" of anticipated pension benefits in violation of 29 U.S.C. § 1054(g), and that Defendants-Appellants had impermissibly amended the ERISA Plan to include that mechanism in violation of 29 U.S.C. § 1054(h). *See id.* at 266–68. We remanded to the District Court to fashion a remedy for these violations. *See id.* at 268. Specifically, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. In addition, we recognized that the District Court could apply the "phantom account" offset mechanism to employees hired after the 1998 amendment to the Plan because those individuals were on notice as to the mechanism's existence. *Id.* at 268–69. *But see Miller*

v. Xerox Corp. Retirement Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006) (holding that Plan's "phantom account" methodology itself violates ERISA), *cert. denied*, 127 S. Ct. 1829 (2007).

Acknowledging our guidance to employ "equitable principles" and reviewing the language of the Plan materials, the District Court concluded that the appropriate remedy for employees hired before the 1998 amendment was to direct the plan administrator to pay each of these individuals "a lump sum in the amount of the difference between the amount of benefits that [an employee] has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'"[1] Frommert, 472 F. Supp. 2d at 458 (internal quotation marks omitted). The District Court also stated that "it would not be unreasonable for the administrator to subtract out the amount of the prior distribution" in order to prevent such employees from receiving windfalls. *Id.* (alterations and internal quotation marks omitted).

In addition, the District Court concluded that the release forms signed by several Plaintiffs-Appellees in exchange for their receiving severance pay from Xerox did not release Defendants-Appellants from the ERISA-based claims asserted in this litigation. *See id.* at 460–65. Other matters addressed by the District Court on remand are not relevant to this appeal, which timely followed.

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[1] The District Court presumed that the parties would be able to agree on which employees had full notice of the "phantom account offset" mechanism because they were rehired after the 1998 Summary Plan Description ("SPD") had been issued. *See Frommert v. Conkright*, 472 F. Supp. 2d 452, 459 (W.D.N.Y. 2007).

DISCUSSION

On appeal, Defendants-Appellants raise two challenges to the District Court's decision. First, Defendants-Appellants argue that the District Court fashioned an improper remedy for the ERISA violation associated with the implementation of the "phantom account offset" mechanism. Second, Defendants-Appellants argue that the District Court erroneously decided that the release forms signed by certain Plaintiffs-Appellees did not bar their ERISA-based claims. For the reasons that follow, we agree with Defendants-Appellants that the release forms at issue bar the signatories' ERISA claims, but we will not disturb the District Court's chosen remedy.

I. Remedy

On appeal, Defendants-Appellants challenge the District Court's remedy for the ERISA violations we identified in our prior decision, *i.e.*, the impermissible amendment of the ERISA plan at issue to calculate Plaintiffs-Appellees' pension benefits according to a "phantom account" offset method. As discussed above, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when

> determining the appropriate calculation and fashioning the appropriate remedy.

Frommert, 433 F.3d at 268. We review a district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion. *See Chao v. Merino*, 452 F.3d 174, 185 (2d Cir. 2006).

Here, the Plan accounts for a retiring employee's total years of working at Xerox, but it also provides that an employee's benefits must "be offset by the accrued benefit attributable to [a prior distribution]." RIGP § 9.6. Plaintiffs-Appellees all received earlier, lump-sum distributions of their pension benefits when they first left their employment at Xerox, and the basic question presented to the District Court was how to ensure that these individuals received their due benefits in light of the ambiguous non-duplication of benefits provision. *See Frommert*, 472 F. Supp. 2d at 457–58 (construing and applying § 9.6 of 1989 Plan). On remand, the District Court decided that the appropriate remedy was to order the plan administrator to recalculate the relevant Plaintiffs-Appellees' benefits to deduct only the nominal value of their prior, lump-sum distributions, *i.e.*, without a "phantom account" adjustment reflecting hypothetical investment gains or, apparently, any other adjustment to reflect the inflationadjusted values of the prior distributions. *See id.* at 458–59.

Defendants-Appellants fail to establish that the District Court's approach violated either the Plan terms or any law. Although Defendants-Appellants contend that the District Court failed to utilize pre-1998 Plan terms, the District Court explicitly did

so but simply applied those terms to Plaintiffs-Appellees differently than Defendants-Appellants proposed. In advocating their proposed "new hire" approach instead of the remedy crafted by the District Court, Defendants-Appellants argue that § 1.44(f) of the 1989 Plan requires that a rehired employee who then retires is entitled only to a pension benefit that accounts for his or her years of service since being rehired; the prior years of service are relevant only for the purpose of "vesting." However, in advocating this "new hire" method, Defendants-Appellants ignore the terms of the 1989 Plan, which is silent as to prior lump-sum distributions pursuant to § 8.2. To the extent that the 1997 Plan applies to certain Plaintiffs-Appellees, Defendants-Appellants ignore the language of § 1.45(f). *See Frommert*, 433 F.3d at 258–60 (discussing such provisions in the various versions of the Plan). Defendants-Appellants have failed to demonstrate that the District Court exceeded its allowable discretion in crafting its chosen remedy instead of adopting DefendantsAppellants' proposed approach.[2]

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[2] Defendants-Appellants also argue that the District Court's remedy confers a "windfall" on Plaintiffs-Appellees in violation of equitable principles. *See, e.g., Prudential Ins. Co. v. S.S. American Lancer*, 870 F.2d 867, 871 (2d Cir. 1989) ("[E]quity, we believe, abhors a windfall."). However, in contrast to *Prudential Insurance*, we do not view the remedy crafted by the District Court to be "wholly unjust" here because Defendants-Appellants wrote the terms of the ERISA Plan in an ambiguous and occasionally self-contradictory fashion. *Cf. Lifson v. INA Life Ins. Co. of N.Y.*, 333 F.3d 349, 353 (2d Cir. 2003) (per curiam) (noting that, in interpreting an ERISA plan, a court "construe[s] ambiguities against the drafter and in favor of the beneficiary").

Alternatively, Defendants-Appellants contend that the District Court erred by failing to adopt the remedy proposed by the plan administrator or, at least, by failing to remand to the administrator the task of fashioning a remedy. Regarding the failure of the District Court to remand to the plan administrator, it does not appear from the record that Defendants-Appellants actually requested such relief from the District Court. As such, they have waived the issue for appeal. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (alterations and internal quotation marks omitted)).

Even if Defendants-Appellants had not waived the remand issue, we would review the District Court's decision to fashion a remedy itself instead of remanding to the plan administrator for an excess of allowable discretion. *See Zervos v. Verizon N.Y., Inc.*, 277 F.3d 635, 648 (2d Cir. 2002); *Kinek v. Paramount Commc'ns, Inc.*, 22 F.3d 503, 508 (2d Cir. 1994). The District Court here did not exceed its allowable discretion in this regard. Although we did not prohibit the District Court from remanding the case to the plan administrator, the language in our prior opinion presumed that the District Court would craft the remedy itself. *See Frommert*, 466 F.3d at 268.

Moreover, Defendants-Appellants had ample opportunity to explain fully the approach proposed by the plan administrator before the District Court, and did so, in their briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan

administrator's approach. Indeed, Defendants-Appellants identify nothing that might have been gained by the District Court's remanding the matter to the plan administrator. *See Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir. 2008) (stating that plaintiffs were not entitled to administrative remand where doing so would have been "futile"); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995) (stating that remand to a plan administrator is not required where such additional proceedings would be a "useless formality" (internal quotation marks omitted)). In addition, we suggested, as "guidance for the district court," that it "may wish to employ equitable principles." *See Frommert*, 466 F.3d at 268. Defendants-Appellants identify no equitable principles that a district court might be employing, immediately upon remand from a circuit court, in merely performing the ministerial function of then remanding a case to an ERISA plan administrator.

Defendants-Appellants rely on *Miller v. United Welfare Fund* to argue that remand is appropriate when "reasonable minds could differ as to the outcome of the case." However, we directed the district court in *Miller* to remand the case to the plan administrator to permit the plan administrator to gather additional evidence relevant to the nursing care sought by the claimant. *See id.* Here, we did not anticipate any comparable, extensive fact finding, and none occurred on remand before the District Court. Indeed, the only "evidence" considered by the District Court consisted of expert testimony regarding which of various proposed remedies was the most fair and equitable. Given the apparent lack of any benefit to remanding the case to the plan administrator and the language in

our prior decision implying that the District Court should fashion its own remedy, *see id.* at 268–69, we cannot conclude that the District Court exceeded its allowable discretion in actually doing so.

In the alternative, Defendants-Appellants argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review. We have held that where the ERISA plan confers upon the plan administrator discretionary authority to "construe the terms of the plan," the district court should review a decision by the plan administrator under an excess of allowable discretion standard. *See Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (2d Cir. 2005) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). However, the District Court here had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations, all of which were premised on the now-impermissible "phantom account" offset mechanism. *See id.* ("[W]e may give deferential review only to actual exercises of discretion."). Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

To the extent that Defendants-Appellants argue that the District Court erred by instructing the plan administrator to calculate benefits by deducting the nominal value of prior distributions denominated in 1980s dollars from accrued benefits denominated in

current dollars, *see Appellants' Br.* at 38–41, we reject their argument for reasons similar to those applicable to their arguments on behalf of their own preferred "new hire" remedy. The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives. *Cf. Lifson v. INA Life Ins. Co. of N.Y.*, 333 F.3d 349, 353 (2d Cir. 2003) (per curiam) (instructing that a court should construe ambiguities in plan terms against the drafter of the ERISA plan).

II. Releases of Certain Plaintiffs' ERISA Claims

The final issue raised in this appeal is Defendants-Appellants' argument that the District Court erred in ruling that the release forms signed by several Plaintiffs-Appellees did not apply to the ERISA claims asserted in this litigation.[3] The releases at

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[3] The District Court stated that twenty-two of the named Plaintiffs signed release forms, but that four of these amended their forms to carve out explicitly their claims as members of the "Frommert lawsuit" from the universe of claims to be covered by the release. *See Frommert*, 472 F. Supp. 2d at 460. On appeal, Defendants-Appellants do not challenge the District Court's conclusion that these individuals' release forms did not cover their ERISA claims in this action. As a result, we will not disturb the

issue provided that the signing employee "release[s] Xerox from any and all claims . . . based on anything that has occurred prior to the date [he or she] sign[s] this Release" in exchange for up to fifty-two weeks of salary continuance. In addition, the form specifies several potential federal claims, including those based in ERISA, that the release covers.

As a threshold matter, Plaintiffs-Appellees argue, for the first time in this appeal, that Defendants-Appellants may not rely upon the release forms signed by several PlaintiffsAppellees because Federal Rule of Civil Procedure 17(a) requires that an action in federal court "be prosecuted in the name of the real party in interest." Although Defendants-Appellants are the pension plan at issue in this litigation and its administrators, Plaintiffs-Appellees argue that only Xerox Corporation has a "sufficient stake in reversing the trial court's ruling that the Xerox general release form constitutes a waiver of ERISA claims by the releasee." *Appellees' Br.* at 39. As noted above, the District Court dismissed Xerox early in this litigation, and PlaintiffsAppellees did not appeal this ruling. *See Frommert*, 433 F.3d at 256 n.2. Moreover, Plaintiffs-Appellees did not challenge the authority of Defendants-Appellants to rely upon the releases below and thus have waived this argument for purposes of this appeal. *See Rogers v. Samedan Oil Corp.*, 308 F.3d 477, 482–84 (5th Cir. 2002) (affirming district court's ruling that third-party defendant had waived real-party-in-interest defense by failing to assert it

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District Court's conclusion that the release forms do not bar the ERISA claims asserted by these four Plaintiffs-Appellees in this litigation.

until the day before trial); *Richardson v. Edwards*, 127 F.3d 97, 99 (D.C. Cir. 1997) (deeming real-party-in-interest defense waived when not raised until appellate proceedings).

Even if Plaintiffs-Appellees had not waived this argument, their real-party-in-interest argument is meritless because the release form itself defines its reference to "Xerox" to include "'the Xerox employee benefit plans'" in which the employee had participated or was then participating. *See Frommert*, 472 F. Supp. 2d at 460 n.2 (quoting release forms). Moreover, Defendants-Appellants are not the parties *prosecuting* this action; that role belongs to Plaintiffs Appellees. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1542 (2d ed. 1990) ("[T]he real party in interest principle . . . directs attention to whether [the] plaintiff has a significant interest in the particular action he has instituted, and Rule 17(a) is limited to plaintiffs."). *Cf. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 49 (2d Cir. 2005) (holding that a Rule 17(a) defect may not be cured by the joinder, as nominal defendants, of the real parties in interest to the action where those parties have evinced no intention of prosecuting the action). Thus, Plaintiffs-Appellees' real-party-in-interest argument fails.

As to the merits of Defendants-Appellants' arguments regarding the releases, "an individual can waive his or her right to participate in a pension plan governed by ERISA only if 'his or her waiver 'is made knowingly and voluntarily.'" *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992) (quoting *Laniok v. Advisory*

Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1365 (2d Cir. 1991)). We have articulated several factors as relevant to the determination of whether such a waiver is knowing and voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.
>
> . . . [T]his list of factors [is] not exhaustive . . . .

Id. (internal citation omitted). A court should consider the "totality of the circumstances" in determining whether a waiver of ERISA rights is knowing and voluntary. *Id.*

Despite acknowledging the explicit and broad language in the release form, the District Court concluded that the instant ERISA claims were not covered due to perceived deficiencies related to "the clarity of the release and the consideration given by Xerox in exchange for the releases." *Frommert*, 472 F. Supp. 2d at 461–62. Specifically, the District Court focused on one paragraph in which the signing

employee agrees that "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." The District Court concluded that this language meant that the employee was not waiving his or her ERISA claim:

> The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was not waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.
>
> . . .
>
> Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distinction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA. In other words, those employees were "entitled by law" not simply to receive some pension benefits, but to have their benefits calculated

> without any reduction attributable to a "phantom" account.

Id. at 462 (footnote omitted; emphasis in original).

In reaching this conclusion, the District Court appears to have conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released.[4] The paragraph on which the District Court focused provided only that the consideration for the release, *i.e.*, the salary continuance, did not replace any benefits, including pension benefits, to which the employee was already entitled. However, there is no allegation that Defendants-Appellants violated this term of the contract by denying these Plaintiffs Appellees any and all pension benefits to which they

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[4] The District Court also appears to have concluded that the releases failed to comply with a provision of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), and that such noncompliance has relevance to the determination of whether these Plaintiffs-Appellees released Xerox from ERISA-based claims. *See Frommert*, 472 F. Supp. 2d at 463 n.5. Section 626(f) specifies several facts that must exist in order to render waiver of claims asserted under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, both "knowing and voluntary." We need not and do not decide whether the release forms complied with the requirements of the OWBPA because such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was "knowing and voluntary." *See Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 375 (5th Cir. 2002) ("[T]he OWBPA . . . applies only to ADEA claims."); *see also Tung v. Texaco Inc.*, 150 F.3d 206, 208-09 (2d Cir. 1998) (per curiam) (concluding that plaintiff's waiver of his Title VII claims was knowing and voluntary despite the employer's noncompliance with § 636(f) requirements applicable to his ADEA claims).

would have been entitled. To the contrary, counsel for Defendants-Appellants represented to this Court at oral argument that several of these Plaintiffs-Appellees had already received pension benefits, albeit calculated under the "phantom account" offset method.

At bottom, neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs-Appellees likely expected at that time can render these releases unenforceable. As the method used to calculate pension benefits for rehired employees was, and has continued to be, disputed throughout this litigation, the precise amount of benefits that an employee signing a release would have received in the absence of such a release was always indeterminate. Plaintiffs-Appellees who signed these releases did so before the District Court crafted its remedy for the ERISA violations we identified. The mere fact that the anticipated recovery associated with ongoing litigation is uncertain does not render an employee's release of claims asserted in that litigation unenforceable. *Cf. Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund*, 902 F.2d 185, 189 (2d Cir. 1990) ("[A] settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty.").

Applying the factors we have articulated as relevant to the issue of whether a waiver of ERISA rights was knowing and voluntary and reviewing the undisputed facts pertaining to these releases under the totality of the circumstances, *see Finz*, 957 F.2d at 82, we conclude that the District Court erred in holding that the releases at issue were unenforceable.

There appears to be no dispute that those Plaintiffs-Appellees who signed these releases had ample time (45 days) to decide whether to sign the release, that Xerox encouraged such individuals to consult an attorney, and that the signatories received salary continuances in consideration of their releasing claims. Some Plaintiffs-Appellees even modified the terms of the release forms with which they had been presented before signing them. As to the language of the releases themselves, we cannot conclude, as the District Court did, that the express terms of these releases were "at the very least ambiguous as to what the employee was giving up in exchange for salary continuance." *Frommert*, 472 F. Supp. 2d at 462. As the District Court's interpretation of the release forms is incorrect, it cannot stand. Unless the release form at issue specifically exempted this litigation as noted above, the releases signed by certain Plaintiffs-Appellees are enforceable.

CONCLUSION

For the foregoing reasons, we VACATE that portion of the order of the District Court holding that eighteen release forms are unenforceable, AFFIRM that portion of the order crafting a remedy for the identified ERISA violations, and REMAND the case for proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

00-CV-6311L

[Dated: January 24, 2007]

PAUL J. FROMMERT, et al.,
Plaintiffs,

v.

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Defendants.

DECISION AND ORDER

INTRODUCTION

This decision constitutes the latest chapter in a long-running dispute between employees of Xerox Corporation and administrators of Xerox's retirement plan, the Xerox Corporation Retirement Income Guarantee Plan ("the Plan"), concerning calculation of

retirement benefits. The dispute involves a relatively small group of employees who previously left employment at Xerox, received a lump-sum distribution upon their initial departure, and then were rehired by Xerox years later. Those employees are now contemplating retirement, or have retired, and the issue in dispute is how their present retirement benefits should be calculated.

With respect to this group of rehired employees, the Plan is designed so that an employee's total years of employment at Xerox, regardless of whether there was a break in service, are counted in calculating the employee's retirement benefits. Generally, the relevant pension calculations are based on the employee's total years of employment times a percentage of the employee's five highest-paying calendar years with Xerox. Both sides in this litigation agree that to avoid duplication of benefits, some sort of offset against current benefits is necessary to reflect the employee's receipt of monies at the time of the prior separation from employment. Just how that offset against current benefits should be calculated, though, has been a matter of much dispute and has engendered a great deal of litigation.

Familiarity with this Court's several prior decisions involving these parties, *see* 328 F.Supp.2d 420 (W.D.N.Y. 2004); 206 F.Supp.2d 435 (W.D.N.Y. 2002), and also the Second Circuit's decision of January 6, 2006, 433 F.3d 254 ("Second Circuit decision") is presumed. These decisions set out in great detail the relevant facts and disputed issues between the parties. There is, therefore, no need to restate those matters here.

The Second Circuit decision, which was on an appeal from two of this Court's prior decisions dismissing some of plaintiff's claims and granting summary judgment in favor of defendants on the remaining claims, resolved many of the issues raised between the parties. The Second Circuit affirmed in part, reversed in part, and remanded the case to this Court for further proceedings.

The Second Circuit held that the Plan's use of a so-called phantom account in determining present benefits violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*, in several respects. First, the Plan's formula constituted a "retroactive cut-back" of benefits, 433 F.3d at 268, contrary to § 204(g) of ERISA. In addition, the court found that employees were not given proper notice in the Summary Plan Description ("SPD") of the nature and scope of the phantom account, at least prior to 1998, when the SPD was amended to include the phantom account and describe the offset procedure. *Id.* at 263, 269.

The Second Circuit determined that employees rehired after 1998 had sufficient notice as to the manner by which Xerox intended to treat their previous distribution. For those rehired prior 1998, though, the Second Circuit remanded to this Court and directed me to "utilize an appropriate pre-amendment [1998] calculation," *id.* at 268, without using the "phantom account," to determine current benefits.

Specifically, the Second Circuit directed as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998

> should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the Court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation in fashioning the appropriate remedy.

Id.

Subsequent to the Second Circuit's decision, the Court met with counsel to determine how best to proceed. The parties agreed to work together to see if they could resolve the issues remaining on remand. Although the parties appear to have spent some time attempting to reach a settlement, it is now apparent that they are unable, or unwilling, to settle.

The Court conducted a two-day hearing on the remedial issues raised by the Second Circuit and has received both pre-hearing and post-hearing memoranda from both sides. The parties have also discussed several cases from other jurisdictions dealing with similar issues. Having considered both sides' submissions and arguments, the Court now issues this Decision and Order concerning the issues before it on remand.

DISCUSSION

I. The Appropriate Calculation of Plaintiffs' Benefits

This Court's task on remand is made easier in many respects by the breadth of the Second Circuit decision. The Circuit resolved many issues and has clearly established the law of the case in many respects. For example, it can no longer be disputed that employees were not give proper notice in either the Plan or the relevant SPD as to the nature of the phantom account and its operation. Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation*, 238 F.3d 205 (2d Cir. 2001). Other courts have reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003). It is clear, then, that Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to 1998, after having previously received a distribution of pension benefits. The Second Circuit has addressed this issue more than once, and Xerox may not continue to utilize this rejected formula.

The Second Circuit also rejected Xerox's contention that a procedure utilizing a phantom account has always been a part of the Plan, even prior to 1998. 433 F.3d at 256. The Circuit determined that Xerox's use of the phantom account constituted a retroactive diminution of benefits, contrary to the law. *Id.* at 268. Furthermore, the Court of Appeals rejected Xerox's

contention that it had properly amended the Plan and notified the Plan's participants concerning utilization of the phantom account, prior to 1998. *Id.* at 263.

Although the Circuit clearly precluded use of the phantom account in determining how to treat prior distributions, it did little to elucidate what formula *should* be adopted, except to suggest using an "appropriate pre-amendment calculation" guided by equitable principles in determining the appropriate remedy for affected employees. *Id.* at 268.

The problem is that if one removes the phantom account mechanism, there is little else remaining. The Circuit expressly recognized this by noting the "difficulty" confronting the district court "because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." *Id.* at 268.

Describing the procedures to be utilized prior to the 1998 amendments as "ambiguous" is generous. In fact, virtually nothing is set forth in either the Plan or the SPD as to the precise mechanism for taking into account a prior distribution in calculating an employee's present benefits after a rehire.

Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the "phantom account," he also had no notice of some of

the other mechanisms suggested by witnesses at the remand hearing before me. What is "best" from a financial or actuarial point of view is not what the Court has been charged with determining. The Court's task, as directed by the Court of Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees.

To the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees, who should suffer. *See Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003) ("The consequences of an inaccurate SPD must be placed on the employer"). It was defendants' obligation to provide a clear description, in the SPD and in the Plan itself, as to how those prior distributions would be treated. To the extent that the Plan was constituted, at Xerox's doing, to consider all prior years of service, defendants had the burden of elucidating precisely how that would be accomplished.

As noted by the Court of Appeals in this case, 433 F.3d at 258, the Plan does have a provision, § 9.6, dealing with "nonduplication of benefits." That section provides as follows:

> *Nonduplication of Benefits.* In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member

> based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

"Accrued benefit," as used in § 9.6, is defined at § 1.1 as follows:

> The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section ... 4.3 [which sets forth the general method for calculating the normal retirement benefit], based, however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed ... .

As the Court of Appeals noted, there was no description whatsoever as to the mechanics of this so-called phantom account. 433 F.3d at 258. For that reason, the Second Circuit and other courts rejected the administrator's utilization of such a mechanism in calculating benefits.

The SPD provides even less guidance than the Plan in this regard. As the Court of Appeals noted, the only notice in the SPD concerning non-duplication of benefits was the proviso that "the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." *Id.* at 265 (citing *Layaou*, 238 F.3d at 210). The Court of Appeals in both *Frommert* and *Layaou* determined that this bare-bones notice failed to adequately apprise employees as to the phantom account mechanism.

In addition, as those and other cases make clear, where the Plan and the SPD conflict, the SPD controls. *See Burke,* 336 F.3d at 110; *Frommert,* 433 F.3d at 265. *Accord Tocker v. Philip Morris Companies, Inc.*, 470 F.3d 481, 487-88 (2d Cir. 2006); *Demirovic v. Building Service 32 B-J Pension Fund*, 467 F.3d 208, 210 n. 1 (2d Cir. 2006); *Bouboulis v. Transport Workers Union of America*, 442 F.3d 55, 61 (2d Cir. 2006).

The question, then, is what, in light of these vague provisions in the Plan and SPD, this Court should to do to remedy the violation of ERISA. I believe that the best course is to do what I did previously in *Layaou* involving a similar remand from the Court of Appeals. *Layaou v. Xerox Corporation,* 330 F.Supp.2d 297 (W.D.N.Y. 2004). In *Layaou*, I directed the administrator "to recalculate plaintiff's retirement benefit, ... and to pay plaintiff a lump sum in the amount of the difference between the amount of benefits that plaintiff has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'" *Id.* at 305 (footnote omitted). I added that "[i]t would not be unreasonable ... for the administrator to subtract out the amount of the prior distribution," in order to avoid giving the plaintiff a windfall, but left it to the Plan administrator to perform the actual calculation of the plaintiff's benefits in the first instance, stating that "[i]f plaintiff believes that the administrator's calculation is erroneous, and the matter cannot be resolved between the parties, he can seek further relief in this Court." *Id.* at 304.

The same process should apply here. This process is straightforward; it adequately prevents employees from receiving a windfall, and I believe it most clearly reflects what a reasonable employee would have

anticipated based on the not-very-clear language in the Plan and SPD. Again, if there is some doubt or ambiguity as to this formula, it must be resolved in favor of the employee. *See Lifson v. INA Life Ins. Co. of New York*, 333 F.3d 349, 353 (2d Cir. 2003) (in reading an ERISA plan, "[w]e construe ambiguities against the drafter and in favor of the beneficiary"); *Perreca v. Gluck*, 295 F.3d 215, 223 (2d Cir. 2002) ("absent evidence indicating the intention of the parties, any ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language").

In so ruling, I also reject defendants' suggestion that the phantom account offset can properly be applied to *all* employees' accrued benefits earned *after* 1998, regardless of when the employees were rehired. As defendants themselves note, the Second Circuit's statement that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," 433 F.3d at 263, "does not expressly contain this limitation," Defendant's Pre-Hearing Brief Addressed to Remedies, Dkt. #121-1 at 23, and I decline defendants' invitation to infer such a limitation from that apparently categorical statement. The Court of Appeals gave this Court specific directives on remand, and determining whether the phantom account offset should apply to post-1998 earned benefits of employees rehired prior to that date was not among those directives.

II. Which of the Plaintiffs Were Rehired by Xerox after the Plan Was Amended in 1998

The Court of Appeals also directed the district court "to determine which of the plaintiffs were rehired by

Xerox after the Plan was amended to include the phantom account and thus can be bound by its terms." 433 F.3d at 269. This directive relates to the Second Circuit's holding that "for employees rehired subsequent to the amendment of the Plan through the 1998 SPD, the phantom account is a component of the Plan that they joined and thus may permissibly be applied to them." *Id.* at 263. As the court explained,

> [e]mployees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors who lacked such information, had the opportunity to make an informed decision about taking or leaving the terms of the deal offered to them under the Plan.

Id. at 269. That matter does not appear to be in dispute, however, and I presume that the parties will be able to agree on whether each employee was rehired prior to or after the 1998 amendment date. If the parties are unable to agree about whether a particular employee was rehired prior to that, they may seek a determination of that question from the Court.

III. Effect of the Releases Signed by Twenty-Two Plaintiffs

On January 5, 2001, plaintiffs' counsel filed a motion for "emergent injunctive relief," seeking relief in connection with Xerox's offer to plaintiffs to accept the termination of their employment as part of a

reduction in force ("RIF"), and to sign a general release waiving any existing or potential claims they might have had against Xerox–including ERISA claims–in exchange for salary continuance, a form of severance benefit in which the employee would continue to receive his full, regular salary for a specified period even after he stopped working at Xerox.

In his affidavit in support of that motion, plaintiffs' attorney, Robert H. Jaffe, Esq., characterized Xerox's offer as a form of discrimination against his clients based on their exercise of their rights under ERISA by filing or joining this lawsuit challenging defendants' use of the phantom account offset. Dkt. #47 ¶ 2.

In his affidavit, Jaffe noted that the proposed release "includes a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." *Id.* ¶ 5. He added that "[t]he form of general release which Xerox has asked at least five clients of my law office to execute explicitly includes a release of all claims under ERISA." *Id.* ¶ 8.

Jaffe stated that as of the date of the affidavit, five of his clients, three of whom were then named plaintiffs in this action, had asked him to review the proposed release "and suggest an alternative which would avoid a waiver of their rights under ERISA," at least until the Second Circuit issued a decision in *Layaou*, which was then pending before the Court of

Appeals.[1] *Id.* ¶ 9. Jaffe stated that he had drafted a revised release containing language "which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." *Id.* ¶ 10. Jaffe said that his clients had presented the revised release to Xerox, but were told by Xerox that "it was unacceptable." *Id.*

After hearing oral argument, this Court denied plaintiffs' motion in open court on January 11, stating in effect that I saw no ERISA violation in an employer's conditioning an offer of severance benefits on a release of ERISA claims. *See* Dkt. #53 at 38-42.

Twenty-two of the 104 named plaintiffs did subsequently sign the releases and were terminated in a RIF in exchange for salary continuance. Dkt. #133-7. Although the exact language used varies somewhat among the releases, in general they state that the employee "release[s] Xerox from any and all claims, even if [the employee] d[oes]n't know about the claim at this time, based on anything that has occurred prior to the date [the employee] sign[s] this Release."[2] The releases expressly referenced a number of types of claims covered by the release, including ERISA claims. With certain exceptions not relevant here, the releases also provided that the employee agreed not to "file or

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[1] The Second Circuit's decision remanding *Layaou* was issued about two weeks after plaintiffs filed their motion, on January 18, 2001.

[2] "Xerox" is defined by the releases to include, *inter alia*, "the Xerox employee benefit plans" in which the employee was a participant, as well as the trustees and administrators of those plans. Dkt. #133-7.

pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before [the employee] signed this Release." *Id.*

Each release also states that the employee "acknowledge[s] and agree[s] that the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." *Id.* Four of the releases, however, contain additional language carving out an exception for plaintiffs' claims in this action: "I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, including my right to a pension under the Xerox Retirement Income Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit." *Id.* at 49, 57, 69, 88.

Plaintiffs now contend that the execution of these releases, even the ones without a specific exclusion for the claims in this lawsuit, does not bar any of them from pursuing their ERISA claims in this action. Plaintiffs contend that the releases are ambiguous in certain respects, and therefore unenforceable.

As a preliminary matter, I note that plan participants can waive ERISA claims, and that such waivers will be enforced as long as they are knowing and voluntary. *See, e.g., Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1367 (2d Cir. 1991) ("the age discrimination provision of ERISA does not prohibit an individual waiver of pension plan participation by an older employee, ... so long as the waiver is knowing and voluntary"); *Mange*

v. Petrolite Corp., 960 F.Supp. 206, 209 (E.D.Mo. 1997) ("Under ERISA, a release of claims by plan participants is valid so long as it is knowing and voluntary"). There is also authority that "[a] settlement agreement that releases legal claims in exchange for severance benefits may be enforced under ERISA." *Seman v. FMC Corp. Ret. Plan*, 334 F.3d 728, 731-32 (8th Cir. 2003); *see also Smart v. Gillette Co. Long-Term Disability Plan*, 887 F.Supp. 383, 386 (D.Mass. 1995) (employee knowingly, intentionally, and voluntarily agreed to a severance plan that included a general release which precluded her ERISA claim), *aff'd*, 70 F.3d 173, (1 Cir. 1995).

The Second Circuit has cautioned, however, that "[t]he validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims." *Finz v. Schlesinger*, 957 F.2d 78, 81 (2d Cir. 1992), *cert. denied*, 506 U.S. 822 (1992); *accord Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 231 (2d Cir. 1995). Courts should look to the "totality of circumstances" to determine whether a release is knowing and voluntary. *Sharkey v. Ultramar Energy Ltd., Lasmo plc, Lasmo (AUL Ltd.)*, 70 F.3d 226, 231 (2d Cir. 1995).

The relevant factors to consider in this analysis include: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7)

whether the employer encouraged the employee to consult an attorney; and (8) whether the employee had a fair opportunity to do so. *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 402-03 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989). These factors are not exhaustive, and all need not be satisfied before a release is deemed enforceable. *Id.*

Here, some of these factors, such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases. Other factors, however, are more troubling, particularly the clarity of the release and the consideration given by Xerox in exchange for the releases.

Paragraphs 3 and 4 of the releases generally provide that the employee releases Xerox from any and all employment-related claims.[3] Paragraph 3 states that the employee "release[s] Xerox from "any and all claims ... based on anything that has occurred prior to the date" on which the employee signed the release, and paragraph 4 states that the employee "also release[s] Xerox from claims based on [any federal, state or local law] concerning employment ... ." Paragraph 3 lists ERISA claims as one of the types of claims waived by the employee. Read literally, this could be construed to mean that the employee was waiving *any* claim under ERISA, based on anything

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[3] These numbers refer to Xerox's standard release form for participation in a voluntary RIF. *See, e.g.*, Dkt. #133-7 at 47. The numbering varies somewhat among the releases signed by plaintiffs (some of whom were terminated in involuntary RIFs), though the provisions are essentially the same.

that occurred prior to the date on which he signed the release.

As stated, paragraph 5 states that the consideration set forth in the release, *i.e.*, Xerox's agreement to provide the employee with salary continuance, is "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." This provision was presumably included in the release in order to conform to the requirements of the Older Workers Benefit Protection Act ("OWBPA"), which was enacted by Congress to modify the Age Discrimination in Employment Act ("ADEA") in certain respects, *see Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134, 150 (2d Cir. 2006).

The OWBPA provides in part that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary," and that in general "a waiver may not be considered knowing and voluntary unless at a minimum" certain conditions are met, one of which is that "the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled ... ." 29 U.S.C. § 626(f).

The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was *not* waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.

Read that way, the releases would not bar plaintiffs' claims here. If plaintiffs were entitled to pension benefits under the law, *i.e.*, ERISA, or under Xerox's own policies, they did not waive their rights to such benefits. Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distiction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA.[4] 433 F.3d at 268. In other words, those employees were "entitled by law" not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Even if some other interpretations of the releases might be plausible, the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance. Section 5 may have been added primarily to comply with the OWBPA, but it cannot be ignored, and when read in conjunction with paragraphs 3 and 4, it appears to create some doubt about whether the release truly covered all ERISA claims, especially the proper calculation of benefits to which the employee was entitled.[5]

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[4] ERISA's anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1).

[5] I recognize that there is authority that noncompliance with the OWBPA does not automatically invalidate a release as to non-

I recognize that these releases were signed during this litigation, and that in plaintiffs' January 5, 2001 motion for injunctive relief, plaintiffs' own counsel expressed his concern that the releases would constitute "a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." Certainly these facts could suggest that at least some of the parties understood the releases to cover their claims in this lawsuit. That does not alter the fact, though, that by its terms, the release appears to except from the scope of the waiver any benefits to which the employee is legally entitled. Under Xerox's interpretation, the Plan administrator could refuse to pay an employee *any* pension and, by dint of the release, the employee could do nothing about it. Again, any ambiguity on that score should be resolved against Xerox, which drafted the releases. *Lifson*, 333 F.3d at 353; *see also Albany Savings Bank, FSB v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997) ("ambiguities in contracts should be construed against the drafter").

Furthermore, if it had been the parties' mutual understanding that the releases covered all of

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ADEA claims. *See Chaplin v. Nationscredit Corp.*, 307 F.3d 368, 375 (5th Cir. 2002); *Kaminski v. CoreStates Fin. Corp.*, No. CIV. A. 98-CV-1623, 1998 WL 800536, at *3 (E.D.Pa. Nov. 18, 1998) That does not make such noncompliance irrelevant, however. The requirements of the OWBPA were intended by Congress to ensure that an employee's waiver of his rights be "knowing and voluntary." 29 U.S.C. § 626(f)(1). Thus, an employer's tendering of consideration that does not exceed the value of anything to which the employee was already entitled is some evidence that the employee's waiver executed in exchange for that consideration was not knowing and voluntary.

plaintiffs' claims in this litigation, it would have been a simple enough matter for Xerox to have included language to that effect in the releases. *See, e.g., Morais v. Central Bev. Corp. Union Employees' Supplemental Ret. Plan*, 167 F.3d 709, 711 (1st Cir. 1999) (enforcing settlement agreement and release that expressly stated that plaintiff had directed his union to withdraw his grievance and demand for arbitration over disputed benefits). A single sentence would have clarified the matter. That some of the *plaintiffs* added language to their releases making clear that the releases did not cover their claims in this action demonstrates how easy it would have been for Xerox to insert language in the other releases to include the employees' claims in this particular case, which was already in litigation.[6]

The omission of any mention of this lawsuit is, in one sense, not surprising, though it is still worth noting. On their face, these releases (other than the ones to which some plaintiffs inserted language expressly excepting their claims in this case from the scope of the release) do not appear to have anything to do with this litigation. Rather, they appear to be standard release forms given to all employees who choose to participate in a RIF, and are aimed at foreclosing the possibility of the employee's later assertion of claims relating to his termination in the

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[6] One could argue, of course, that the language added by several plaintiffs excluding their claims in *Frommert* suggests that the other releases *did* cover those claims. That some plaintiffs chose to insert language clarifying what they understood to be the scope of the release, however, sheds little light on the meaning of the other plaintiffs' releases, which remain, at best, ambiguous on that score.

RIF. In an effort to make them comprehensive, the release form lists an array of statutes, including ERISA, that it is intended to cover, but otherwise there is no suggestion that plaintiffs' claims in this case, or any other particular claims, were being waived. On the contrary, the reference to the stated consideration being "in addition to anything of value to which [the employee is] entitled by law or Xerox policy" suggests that the employee did *not* waive any then-pending claims alleging an entitlement to some particular benefits.

Another factor that the Second Circuit has directed courts to consider in deciding whether a waiver is enforceable is whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law. *Bormann*, 875 F.2d at 403. In the case at bar, it appears that, at least with respect to some of the plaintiffs, the consideration received by the plaintiffs, *i.e.*, salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset. In the case of plaintiff Pietrowski, for example, it appears that his prior lump-sum payment at the time of his first separation, plus his severance pay at the time of his second separation, totaled about $210,000, but that he would have received over $832,000 as a lump-sum payment of his standard Plan annuity. *See* Dkt. #130-2 Ex. D.

Defendants do not appear to dispute that the plaintiffs in question received less than they would have without the phantom account offset; they simply contend that the consideration received was substantial, and that in any event, the disparity is not as great as plaintiffs contend because defendants'

proposed remedial approach would still result in a lesser benefit than what plaintiffs seek. Of course, I have rejected that remedial approach.

The consideration received by plaintiffs here–in some cases up to a year's salary–was not insignificant. In light of the Second Circuit decision, however, it cannot be said that these benefits exceeded what plaintiffs were entitled to by law, *i.e.*, pension benefits calculated without a phantom account offset. While it is true that plaintiffs did not know, at the time that they signed the releases, what the ultimate result of this litigation would be, both they and Xerox knew that plaintiffs were pursuing ERISA claims for amounts far greater than what Xerox was offering them in exchange for signing the releases.[7] This at least casts some additional doubt on whether the releases were entered into knowingly and voluntarily with respect to plaintiffs' ERISA claims. *See Unum Life Ins. Co. of America v. Cappello*, 278 F.Supp.2d 228, 236 (D.R.I. 2003) (value of consideration that plan participant received, though "not an insubstantial sum," did not match what issuer of plan contended she waived by entering into severance agreement, since it was likely that amount of benefits to which she would have been entitled would have been substantial).

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[7] It appears that one plaintiff, Matthew Alfieri, signed his release on October 27, 2006, after the Second Circuit decision was issued. Dkt. #133-7 at 46. I see no reason for this Court to rule any differently as to Alfieri, however. If anything, the Second Circuit decision had by that point made it even clearer that Alfieri, like the other plaintiffs, was entitled to calculation of his pension benefit without the phantom account offset, and therefore that he was not waiving his claim in that regard.

I also note that paragraph 3 only releases Xerox from claims "based on anything that ha[d] occurred prior to the date" on which the release was signed. Arguably, that language did not cover plaintiffs' later receipt of benefits, in amounts less than that to which they claim they are entitled, due to the use of the phantom account offset. At the time the releases were signed, plaintiffs had not yet left Xerox's employ, and had only received projections of what their benefits would be. Again, that is not the only reasonably interpretation; one could also argue that in light of the existence of this lawsuit challenging that very offset, everyone involved understood the releases to cover any claims concerning the offset. But this nonetheless adds to the ambiguity of the scope of the release, which should not be resolved against plaintiffs.

IV. Breach of Fiduciary Duty

In its decision in this case, the Court of Appeals concluded that there was a triable issue of fact as to "whether the defendants had fiduciary obligations under ERISA and if so whether they breached them ... ." 433 F.3d at 271. The court stated that

> [o]n remand, the district court should permit a trier of fact to assess (1) whether the defendants acted in a fiduciary capacity when they communicated with the Plan's beneficiaries about the implementation of the phantom account, and (2) whether those communications contained affirmative misrepresentations of fact concerning the Plan or breached the defendants' duty to deal fairly with the Plan's beneficiaries.

Id. at 271-72. The court also "direct[ed] the district court that if the plaintiffs prevail on this claim, it must determine what 'appropriate equitable relief' is necessary." *Id.* at 272.

Although it might appear difficult to reconcile this directive with the Court of Appeals' holding that "[b]ecause adequate relief is available under [§ 502(a)(1)(B), which allows a plan participant 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan'], there is no need on the facts of this case to also allow equitable relief under § 502(a)(3)," 433 F.3d at 270, I find it unnecessary to resolve any apparent contradiction in that regard, since plaintiffs do not appear to seek any equitable relief on remand, other than relief which either this Court has effectively granted, or which the Second Circuit has already found to be unwarranted.

Plaintiffs do contend that the Court should rule that the Second Circuit's decision in this case is "class-based," and that it "encompasses all rehired Xerox employee rehired prior to the publication of the September 1998 SPD," Dkt. #129-1, but to the extent that plaintiffs seek some sort of declaratory or injunctive relief in that regard, the Second Circuit has held that this is not a proper case for such relief. As stated, the Court of Appeals held that "the necessary remedies can be fully provided under § 502(a)(1)(B)," 433 F.3d at 269, and concluded that "sweeping relief" in the form of a judgment declaring that the phantom account is prohibited by ERISA and enjoining its

application in calculating the benefits of any Plan participants was "not warranted," *id.*[8]

Having said that, the rulings contained both in the Second Circuit decision and in this Decision and Order *do* seem applicable to all Xerox employees who are similarly situated to the named plaintiffs. Leaving aside any particularized defenses that the Plan might have against individual employees, I do not see how defendants could continue to utilize the phantom account as to such employees without running afoul of the Second Circuit's holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." 433 F.3d at 263. The clear import of the Second Circuit's decision is that utilization of the phantom account with respect to employees rehired before the 1998 Plan amendment violates ERISA. But neither this Court, nor apparently the Second Circuit, sees any basis for granting equitable relief in that regard at this time.

I also note that the purported basis for plaintiffs' claim for breach of fiduciary duty appears to have shifted somewhat over the course of this litigation. Originally, plaintiffs alleged that "defendants breached their fiduciary duty to Plan participants by publishing and supplying misleading information in SPDs, annual Personal Benefits Statements and in response to the plaintiffs' requests for clarification of their rights under the Plan." 433 F.3d at 270. On remand,

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[8] If plaintiffs' use of the term "class-based" is meant to imply that the Court should grant some "class"-wide relief, that request is also denied. This is not a class action, nor have plaintiffs ever presented it as, or sought to make it a class action.

however, this claim seems to focus largely if not entirely on the releases signed by some of the plaintiffs. Specifically, plaintiffs now contend that defendants breached their fiduciary obligation to disclose to those Plan participants who signed the release "that implementation of the phantom account offset violates ERISA § 204(g) and ERISA § 204(h) and further that the consideration paid for executing the release was substantially less than the retirement benefits to which they may be entitled to receive [sic] if the phantom account offset was not applied." Dkt. #129-1 at 15.

In any event, the relief that plaintiffs now seek is simply a ruling by this Court that the releases are unenforceable against plaintiffs insofar as it purports to waive claims for "enhanced" retirement benefits, *i.e.*, benefits calculated without using the phantom account offset. *See id.* at 19. That is essentially what the Court has done. Plaintiffs are getting all of the relief, equitable or otherwise, to which they are entitled. There is no need, therefore, to rule on plaintiffs' claim for breach of fidudiary duty.

V. Plaintiff Holland

Plaintiff Lawrence R. Holland has at all relevant times been an hourly (*i.e.*, non-salaried) Xerox employee who is covered by the terms of a collective bargaining agreement. Defendants contend that as such, Holland has never been a participant in the Plan, which by its terms excludes from its coverage "[a]ny person covered by a collective bargaining agreement, the terms of which do not require coverage under this Plan ... ." Dkt. #121-5 at 6. Therefore,

defendants contend, Holland lacks standing to sue for benefits under the Plan.

In response, plaintiffs do not appear to deny that Holland is a participant in a different pension plan from the one at issue in this case, but contend that the plan in which he is a participant utilizes the same phantom account offset as the Plan covering the other plaintiffs. The essence of plaintiffs' argument seems to be that the Court should simply allow Holland's claims to go forward in this case so that hourly Xerox workers will be able to benefit from the Second Circuit's rulings in this case and the relief ordered by this Court with respect to the other named plaintiffs.

Holland's request must be denied. It is axiomatic that only plan participants and beneficiaries may sue for benefits under § 1132(a)(1)(B). *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100-01 (2d Cir. 2005) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27 (1983)). Holland's suggestion that the Court allow the administrators of his plan to be joined as defendants in this action is denied, as plaintiff has shown no basis for adding additional defendants in this case at this late date. Plaintiffs' contention that defendants have only recently raised the argument that Holland is not entitled to any benefits under the Plan is contradicted by this Court's July 30, 2004 Decision and Order, in which I expressly referenced (but found it unnecessary to decide) defendants' arguments to that effect, 328 F.Supp.2d at 439 n. 14. Furthermore, plaintiffs have made no motion to amend the complaint to add additional defendants, and plaintiffs' memoranda and

other papers on remand are not a proper vehicle for making such a request.[9]

VI. Plaintiffs' Motion to Amend the Complaint

On November 6, 2006, plaintiffs filed a motion for leave to file a second amended and consolidated complaint, adding a number of additional plaintiffs in this case. The gist of the motion was that following the remand from the Second Circuit, additional Xerox employees who had been separated from and then rehired by Xerox prior to 1998 contacted plaintiffs' counsel, seeking to join in or obtain the benefits of this lawsuit. Plaintiffs' counsel wrote to the Plan administrator, essentially asking him to waive these individuals' exhaustion requirements under ERISA and apply the rulings of this Court and the Court of Appeals in this case and in *Layaou* to these additional Plan participants. Dkt. #132-3 at 1-4. The administrator's response was, essentially, that until a "final resolution" of this action, the phantom account offset would continue to be applied to all Plan participants, with "no exception or deviation." *Id.* at 5.

To the extent that any of the proposed new plaintiffs have not yet retired from Xerox, I see no basis for adding them to this lawsuit. As stated earlier, the Second Circuit's holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," 433 F.3d at 263,

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[9] It would seem to be beyond dispute, though, that use of a "phantom account" in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan. It is presumed that no plan administrator would knowingly violate ERISA.

would certainly seem to foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits.

At this point, however, this motion has not been briefed by defendants, and since there may be issues involving individualized defenses or other matters bearing upon the motion to amend, I will not decide the motion at this time, but will instead reserve decision after the matter has been fully briefed, as set forth in the Conclusion of this Decision and Order.

CONCLUSION

Plaintiffs' motion for a determination of the decision of the Second Circuit Court of Appeals and for other further relief (Dkt. #129) is granted in part and denied in part, and defendants' cross-motion for partial summary judgment (Dkt. #133) is granted in part and denied in part. Defendants are hereby directed to recalculate plaintiffs' retirement benefits, consistent with the terms of this Decision and Order and the January 6, 2006 decision of the Court of Appeals for the Second Circuit, and to pay each plaintiff a lump sum in the amount of the difference between the amount of benefits that each plaintiff has received, and the amount of the recalculated benefit, without any consideration of a "phantom account." Plaintiffs' claim for breach of fiduciary duty is denied as moot. Plaintiff Lawrence Holland's claims are dismissed in their entirety.

Defendants are directed to respond to plaintiffs' motion for an extension of time to file a second consolidated and amended complaint (Dkt. # 132) within thirty (30) days after the date of issuance of

this Decision and Order. Plaintiffs shall file reply papers no later than fifteen (15) days after the date that defendants' response is filed.

IT IS SO ORDERED.

/s/_____
DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
January 24, 2007.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 07-0418-cv

[Filed September 25, 2008]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight.

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE,

THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,

Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, AND XEROX CORPORATION, A NEW YORK CORPORATION, *Defendants-Appellants*,	)
XEROX CORPORATION, *Defendant*.	)

Appellees, Paul J. Frommert, Alan H. Clair, Donald S. Foote, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 07-0418-cv

[Filed September 25, 2008]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight.

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLACHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE,

THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,

Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, AND XEROX CORPORATION, A NEW YORK CORPORATION, *Defendants-Appellants*,	)
XEROX CORPORATION, *Defendant*.	)

Appellants, Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 07-0418-cv

[Filed September 25, 2008]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight.

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE,

THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,

Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, AND XEROX CORPORATION, A NEW YORK CORPORATION, *Defendants-Appellants*,	)
XEROX CORPORATION, *Defendant*.	)

Appellees, Kenneth W. Pietrowski, William Burritt, William Coons, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

APPENDIX F

XEROX®

Name: Charles Hobbs
Employee# 188766
SSN: [REDACTED]-7427

PSG
VOLUNTARY REDUCTION IN FORCE

REQUEST TO PARTICIPATE & GENERAL RELEASE

Request to Participate

1. I hereby request to participate in the Voluntary Reduction in Force Program ("VRIF") as described in the 2005 BGO Production Systems Group Voluntary Reduction in Force Employee Fact Sheet, dated October 24, 2005 (the "Fact Sheet"). My decision to apply is voluntary and I have not been pressured into it. I have carefully reviewed and understand the Fact Sheet, and agree to all its terms and conditions. I have not relied on any oral representations, promises or agreements of any kind in connection with my decision to apply to participate in the VRIF.

General Release

2. In consideration of Xerox Corporation's ("Xerox") agreement to provide me with salary continuance (per the terms of the VRIF Employee Fact Sheet provided to me) and other

valuable consideration, I release Xerox from all the claims described in this Release. For purposes of this Release, "Xerox" includes its employees, directors, officers, agents, stockholders, subsidiaries, affiliates, successors, assigns, and the Xerox employee benefit plans in which I either am now or have been a participant, and the trustees, administrators, successors, agents and assigns of those plans.

3. I release Xerox from any and all claims, even if I don't know about the claim at this time, based on anything that has occurred prior to the date I sign this Release. For example, I release Xerox from any claims based on all laws, such as the following (all laws as currently amended):

Age Discrimination and Employment Act of 1967 (ADEA)
Older Workers's Benefits Protection Act of 1990 (OWBPA)
Title VII of the Civil Rights Act of 1964
Civil Rights Acts of 1866, 1870, 1871 and 1991
Americans with Disabilities Act of 1990
Rehabilitation Act of 1973
Family and Medical Leave Act of 1993
Equal Pay Act of 1963
Fair Labor Standards Act of 1938

Employee Requirement Income Security Act of 1974
Workers Adjustment and Retraining Notification Act of 1989
Uniformed Services Reemployment Rights Act of 1994
Vietnam Era Veteran's Readjustment Assistance Act of 1974

4. I also release Xerox from claims based on the laws of the state(s) where I am employed and reside, such as state fair employment practices laws or any other law, whether federal, state or local, concerning employment. I release Xerox from claims based on discrimination in employment such as claims arising out of the offer of employment to me by Xerox, the hiring of me by Xerox, any employment contract between Xerox and me, any promises made by Xerox regarding future employment, or based on the termination of my employment. Finally, I also release Xerox from claims under state contract or tort law, and from all claims for punitive or compensatory damages, costs or attorney's fees.

5. I acknowledge and agree that the consideration set forth in this release is in addition to anything of value to which I am entitled by law or Xerox policy.

6. I understand and agree that this Release and Xerox's agreement to provide consideration to

me should not be construed, in any way, as an admission by Xerox of any wrongdoing or liability to me.

/s/ CH
Please initial page 1 here

[Received DEC 7, 2005]

7. I understand that nothing set forth in this Release limits my right to file, or prevents me from filing, a charge or complaint with the EEOC or any comparable state agency, nor does anything in this Release limit my right to participate in an investigation or proceeding conducted by the EEOC or any comparable state agency.

8. I understand that nothing in this Release limits my right to challenge this Release as not being knowing and voluntary under the ADEA or the OWBPA if I feel this Release does not comply with the requirements of those statutes.

9. Except as provided in paragraphs 7 and 8 above, however, I agree that I will not file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before I signed this Release. If I do not comply with my obligations under this paragraph, I shall repay to Xerox upon demand all of the monies paid to me by Xerox as salary continuance in consideration for this Release, and I agree to pay all of Xerox's costs and expenses in

defending the claim or action, including Xerox's reasonable attorney's fees.

10. I understand and acknowledge that Xerox policy provides that for a period of one year after the termination of my employment with Xerox, I am not eligible for rehire as an employee, or for retention as a contract worker or consultant.

11. I acknowledge that I have been advised by Xerox as follows:

- **TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE I SIGN THIS RELEASE;**
- **TO TAKE SUFFICIENT TIME TO DECIDE WHETHER TO SIGN THIS RELEASE. I HAVE 45 DAYS FROM THE DATE THIS RELEASE IS PROVIDED TO ME TO CONSIDER IT BEFORE I SIGN AND RETURN IT TO XEROX;**
- **THAT EVEN AFTER I SIGN AND RETURN THIS RELEASE TO XEROX, I WILL HAVE 7 DAYS THEREAFTER TO CHANGE MY MIND AND REVOKE MY RELEASE BY ASKING XEROX FOR ITS RETURN.**

12. I understand and agree that this Release waives all claims I may have at the time I sign it, including claims I do not then know about or suspect. I further understand and acknowledge that California Civil Code, Section 1542 provides: "A GENERAL RELEASE DOES NOT

EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." I waive any rights I may have under that Code section, if applicable, or any other similar state or federal statute or common law principle of similar effect.

Date Release provided to employee: October 24, 2005

Date signed and returned to Xerox: Dec. 7, 2005.

By: /s/ Charles Hobbs
Employee signature

Charles Hobbs
Employee Name (Please print)

188766
Xerox Employee Number

General Release
Revised August 23, 2005

APPENDIX G

XEROX®

Name: Charles Zabinski
Employee# 973201
SSN: [REDACTED]-1328

PS&SCO
VOLUNTARY REDUCTION IN FORCE

REQUEST TO PARTICIPATE & GENERAL RELEASE

Request to Participate

1. I hereby request to participate in the Voluntary Reduction in Force Program ("VRIF") as described in the 2005 BGO Paper, Supplies & Supply Chain Operations Voluntary Reduction in Force employee Fact Sheet, dated August, 2005 (the "Fact Sheet"). My decision to apply is voluntary and I have not been pressured into it. I have carefully reviewed and understand the Fact Sheet, and agree to all its terms and conditions. I have not relied on any oral representations, promises or agreements of any kind in connection with my decision to apply to participate in the VRIF.

General Release

2. In consideration of Xerox Corporation's ("Xerox") agreement to provide me with salary continuance (per the terms of the VRIF

Employee Fact Sheet provided to me) and other valuable consideration, I release Xerox from all the claims described in this Release. For purposes of this Release, "Xerox" includes its employees, directors, officers, agents, stockholders, subsidiaries, affiliates, successors, assigns, and the Xerox employee benefit plans in which I either am now or have been a participant, and the trustees, administrators, successors, agents and assigns of those plans.

3. I release Xerox from any and all claims, even if I don't know about the claim at this time, based on anything that has occurred prior to the date I sign this Release. For example, I release Xerox from any claims based on all laws, such as the following (all laws as currently amended):

Age Discrimination and Employment Act of 1967 (ADEA)
Older Workers's Benefits Protection Act of 1990 (OWBPA)
Title VII of the Civil Rights Act of 1964
Civil Rights Acts of 1866, 1870, 1871 and 1991
Americans with Disabilities Act of 1990
Rehabilitation Act of 1973
Family and Medical Leave Act of 1993
Equal Pay Act of 1963
Fair Labor Standards Act of 1938

Employee Requirement Income Security Act of 1974
Workers Adjustment and Retraining Notification Act of 1989
Uniformed Services Reemployment Rights Act of 1994
Vietnam Era Veteran's Readjustment Assistance Act of 1974

4. I also release Xerox from claims based on the laws of the state(s) where I am employed and reside, such as state fair employment practices laws or any other law, whether federal, state or local, concerning employment. I release Xerox from claims based on discrimination in employment such as claims arising out of the offer of employment to me by Xerox, the hiring of me by Xerox, any employment contract between Xerox and me, any promises made by Xerox regarding future employment, or based on the termination of my employment. Finally, I also release Xerox from claims under state contract or tort law, and from all claims for punitive or compensatory damages, costs or attorney's fees.

5. I acknowledge and agree that the consideration set forth in this release is in addition to anything of value to which I am entitled by law or Xerox policy, including my right to a pension under the Xerox Retirement Income Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit.

6. I understand and agree that this Release and Xerox's agreement to provide consideration to me should not be construed, in any way, as an admission by Xerox of any wrongdoing or liability to me.

/s/ CZ
Please initial page 1 here

7. I understand that nothing set forth in this Release limits my right to file, or prevents me from filing, a charge or complaint with the EEOC or any comparable state agency, nor does anything in this Release limit my right to participate in an investigation or proceeding conducted by the EEOC or any comparable state agency.

8. I understand that nothing in this Release limits my right to challenge this Release as not being knowing and voluntary under the ADEA or the OWBPA if I feel this Release does not comply with the requirements of those statutes.

9. Except as provided in paragraphs 7 and 8 above, however, I agree that I will not file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before I signed this Release. If I do not comply with my obligations under this paragraph, I shall repay to Xerox upon demand all of the monies paid to me by Xerox as salary continuance in consideration for this Release, and I agree to pay all of Xerox's costs and expenses in

defending the claim or action, including Xerox's reasonable attorney's fees.

10. I understand and acknowledge that Xerox policy provides that for a period of one year after the termination of my employment with Xerox, I am not eligible for rehire as an employee, or for retention as a contract worker or consultant.

11. I acknowledge that I have been advised by Xerox as follows:

- **TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE I SIGN THIS RELEASE;**
- **TO TAKE SUFFICIENT TIME TO DECIDE WHETHER TO SIGN THIS RELEASE. I HAVE 45 DAYS FROM THE DATE THIS RELEASE IS PROVIDED TO ME TO CONSIDER IT BEFORE I SIGN AND RETURN IT TO XEROX;**
- **THAT EVEN AFTER I SIGN AND RETURN THIS RELEASE TO XEROX, I WILL HAVE 7 DAYS THEREAFTER TO CHANGE MY MIND AND REVOKE MY RELEASE BY ASKING XEROX FOR ITS RETURN.**

12. I understand and agree that this Release waives all claims I may have at the time I sign it, including claims I do not then know about or suspect. I further understand and acknowledge that California Civil Code, Section 1542 provides: "A GENERAL RELEASE DOES NOT

EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." I waive any rights I may have under that Code section, if applicable, or any other similar state or federal statute or common law principle of similar effect.

Date Release provided to employee: August 25, 2005

Date Signed and returned to Xerox: September 14, 2005.

By: /s/ Charles Zabinski
Employee signature

Charles Zabinski
Employee Name (Please print)

973201
Xerox Employee Number

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

00-CV-6311(L)

[Filed November 10, 2006]

PAUL J. FROMMERT, et al.,
Plaintiffs,

v.

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS and XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Defendants.

DEFENDANTS' STATEMENT OF MATERIAL FACTS

DEFENDANTS' LOCAL RULE 56 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Local Rule 56, defendants the following material facts are not in genuine dispute:

1. Defendant Xerox Corporation Retirement Income Guarantee Plan (the "RIGP") was and is an ERISA-covered employee pension benefit plan. (*See, e.g.*, First Consolidated and Amended Complaint ¶ 1; 1989 Plan documents attached as Exhibit A to Kaster Aff.).

2. The RIGP was at all relevant times governed by a plan document, which was amended and restated from time to time. (*See* 1989 RIGP attached as Exhibit A to Kaster Aff.).

3. The RIGP provides retirement benefits only to eligible employees, who are defined to exclude "[a]ny person covered by a collective bargaining agreement whose terms do not require coverage under this Plan." (Kaster Aff., Ex. A, section 1.14; *see also* Jaffe Aff., sworn to November 15, 2006, Exhibit A, relevant portions of the Summary Plan Description ("SPD") stating that the retirement plan is "for exempt and non-exempt salaried employees (employees who are not covered by a collective bargaining agreement.)."

4. Xerox Corporation also maintains a separate retirement plan for its union employees entitled, "Retirement Income Guarantee Plan of Xerox Corporation and the Xerographic Division, UNITE HERE" (hereinafter referred to as the "RJGP UNITE HERE"). (*See* Exhibit B to the Kaster Aff.).

5. The Plan Administrator for the RIGP for Union Employees is the Joint Administrative Board. (*See* Exhibit B to the Kaster Aff., Article 10, section 10.1).

6. Plaintiff Lawrence Holland is a member of a union which represents hourly workers at Xerox. (First Consolidated and Amended Complaint ¶ 11).

7. Holland's retirement benefits are determined by the terms of the RIGP UNITE HERE, and he is not entitled to any benefits under the terms of the defendant RIGP. Kaster Aff. ¶¶ 3-8 and its Ex. A and B.

8. Defendants Conkright, Nazemetz, and Becker have served as the RIGP's Plan Administrator. (First Consolidated and Amended Complaint ¶¶ 13-15).

9. On or about January, 4, 2001, plaintiffs filed a motion for emergent injunctive relief requesting that Xerox be enjoined from conditioning the offer of a Voluntary Reduction in Force ("VRIF") package upon the waiver of plaintiffs' claims for in this suit for a recalculation of their retirement benefits under ERISA. In support of that motion, plaintiffs submitted an affidavit from Robert Jaffe, sworn to January 4, 2001, with attached exhibits and a Memorandum of Law.

10. Opposing counsel stated in his January 4, 2001 Affidavit submitted in support of plaintiffs' prior motion for emergent relief that "my clients have been asked to sign a general release which includes a waiver or withdrawal of any claims that were made or could have been made by them for a recalculation of retirement benefits under ERISA." (Jaffe January 4, 2001 Aff. ¶ 5. Opposing counsel further states that at least five of his clients have been asked to execute a general release which "explicitly includes a release of all claims under ERISA." (*Ia.* at ¶ 8). Opposing counsel further acknowledges in that January 4, 2001 Affidavit that the form of the general release recommends to Xerox employees considering the VRIF to consult with an attorney before signing a release and he further

avers that several employees who he represents have followed this recommendation and sought his advice. (*Id.* at ¶ 9). These individuals were: William Coons, Gerald Leonardo, Walter Petroff, Richard Spring, and Thomas Vasta. (*Id.*).

11. Xerox Corporation ("Xerox") from time to time has announced voluntary reduction in force ("VRIF") programs or involuntary reduction in force ("IRIF") actions. Xerox has a policy covering which provides for the payment of salary continuance, and may include additional incentives, in consideration for the employee signing a general release of claims, which includes up to 52 weeks of salary continuance (depending on their length of service). *See* Kaster Aff., Exhibit C.

12. The RIGP Plan Administrators did not have any involvement in Xerox' establishing or implementing the VRIF or IRIF policies, including the conditioning the payment of a salary continuance upon the signing of a general release. Kaster Aff., Ex. C; and Ex. A, RIGP section 10.5, Duties of Plan Administrator.

13. Twenty-two individual plaintiffs have executed general releases as part of either a VRIF or IRIF, including Mathew Alfieri; William Burritt (December 1, 2005); Frank Commesso (September 22, 2005); William Coons (August 6, 2002), Bruce Craig (January 1 2003); Richard Crater (December 7, 2005); Frank Darling (November 27, 2005); John Crisafulli (August 31, 2004); Deborah Davis (January 15, 2004); Charles Drannbauer (November 10, 2002); Carol Gannon ((May 24, 2001); James Garnier (September 30, 2005); Larry Gallagher (December 5, 2005); Janice Heller (June 11,

2002); Charles Hobbs (December 7, 2005); Gerald Leonardo (December 18, 2002); Charles Maddalozzo (June 17, 2003); Walter Petroff,(September 2, 2004-); Kenneth Pietrowski (November 5, 2005); Irshad Qureshi (February 23, 2001); Charles Williams (November 2, 2002); and Charles Zabinski (September 14, 2005). Kaster Aff., Exhibit D).

14. Each of these individuals identified above are educated and worked in salaried positions at Xerox for many years. Using opposing counsel's own example, Plaintiff Pietrowski has a college degree, was employed in an engineering position in Xerox's Innovation Group, and admittedly signed a General Release on November 23, 2005.

15. The Releases signed by the above individual plaintiffs expressly provide, in pertinent part, that employee releases "Xerox from any and all claims, based upon anything that has occurred prior to the date I signed the release," including claims under ERISA. For purposes of the release, 'Xerox" is defined to include, not only the company, but any of its employees, and agents, and employee benefit plans in which the plaintiff participates or participated. In signing the release, each employee acknowledges that he or she did so voluntarily and was **not** pressured into it. Kaster Aff. Ex. D.

16. The Releases signed by the above individual plaintiffs also expressly advised plaintiffs: **"TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE SIGNING THIS RELEASE; TO TAKE SUFFICIENT TIME TO DECIDE**

WHETHER TO SIGN THE RELEASE." Kaster Aff. Ex. D.

17. The Release signed by the above individual plaintiffs further informed plaintiffs that them had 45 days to consider the release before returning it and that they had an additional 7 days to change their mind and revoke their decision. (Exhibit C, p. 2 to the Jaffe Aff.; Kaster Aff. Ex. D).

18. In signing the Release, the above individual plaintiffs further agreed **not** to file or pursue any claim or action with any court against the releasees for events which took place prior to the date of the release and agreed to pay all of the releasees' costs and expenses in defending against a claim, including reasonably attorney's fees, should he act contrary to the terms of the Release. Kaster Aff. Ex. D

19. The above individual plaintiffs were paid or will be paid by the end of their salary continuance period up to 52 weeks of salary continuance. Kaster Aff. Ex. D.

20. Plaintiff Pietrowski was paid salary continuance totaling $130,971 in exchange for signing a Release. *See* page 10 of Plaintiffs' Memorandum of Law submitted in support of their motion, which states the amount Pietrowski was paid.

21. At the time that the above individual plaintiffs signed the releases, they were represented by counsel, and their ERISA claims were in dispute. *See* dates on the releases attached as Ex. D to the Kaster Aff.

22. At the time Pietrowski executed his Release, this Court had granted summary judgment dismissing plaintiffs' claims, and the matter was on appeal. *See* date on Pietrowski release, contained in Kaster Aff. Ex. D.

23. Each of the above individual plaintiffs was given 45 days within which to consider whether or not to sign the release. Moreover, pursuant to the terms of their releases, each plaintiff was given seven additional days within which to revoke his or her decision. Kaster Aff. Ex. D.

Dated: November 10, 2006

Respectfully submitted,

NIXON PEABODY LLP
Attorneys for Defendants

By: /s/ Margaret A. Clemens
Margaret A. Clemens, Esq.

Clinton Square
P.O. Box 31051
Rochester, New York 14603-1051
(585) 263-1000

[A-1045 – A-1050]

Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

NOS. 08-803, 08-826

IN THE

Supreme Court of the United States

PAUL J. FROMMERT, ET AL.,
Petitioners,

v.

SALLY L. CONKRIGHT, ET AL.,
Respondents.

On Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION

MICHAEL D. RYAN
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45 Glover Avenue
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COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Respondents

January 2009

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that Release Petitioners' release of their ERISA claims was enforceable where (1) the Second Circuit recited an undisputedly correct rule of law that takes individual circumstances into account, and (2) applied that rule to an undisputed factual record regarding Release Petitioners' individual circumstances?

2. Whether the Second Circuit correctly applied "federal common law" in applying a well-established legal standard to the unique facts of this case?

3. Whether the Second Circuit correctly held that statutory requirements applicable by their terms only to releases of claims under the Older Workers Benefit Protection Act are inapplicable to ERISA claims?

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STATEMENT OF THE CASE

This lawsuit began in 1999, when a number of current and former participants in the Xerox Corporation Retirement Income Guarantee Plan ("Plan") sued the Plan, the Plan Administrators, and Xerox Corporation under the Employee Retirement Income Security Act of 1974 ("ERISA"). During the pendency of the lawsuit, the 18 Release Petitioners executed agreements releasing Respondents from "any and all claims" in exchange for a substantial salary continuance benefit. Two separate sets of Release Petitioners have petitioned this Court arguing that those releases are unenforceable. This Consolidated Brief in Opposition addresses both Petitions.

In the underlying lawsuit, Release Petitioners asserted that a Plan provision that reduced their benefits was not properly added to the Plan. In 2006, the Second Circuit agreed with Release Petitioners that the Plan provision in question was not properly disclosed to Plan participants until 1998. The Second Circuit later held that the 18 Release Petitioners' claims were barred by releases they signed between 2001 and 2006 in connection with their separation from Xerox. The latter holding was correct and, in any event, does not warrant review by this Court.

In the first of the two Petitions, the *Pietrowski* Petitioners argue that the Second Circuit adopted a "group standard" under which the individualized circumstances of employees releasing ERISA claims need not be considered. In fact, the Second Circuit did *not* adopt a "group standard"; rather, it applied

the very totality-of-the-circumstances test that Release Petitioners concede is applicable. That test, both as stated and as applied by the Second Circuit in the decision below, accords with the decisions of other Circuits and *does* take individual circumstances into account. Release Petitioners, moreover, never offered any individualized evidence in opposing Respondents' motion for summary judgment. Nor did they argue in the Second Circuit that a remand for additional factual development might have been required. For these reasons, the *Pietrowski* Petition should be denied.

In the second Petition, the *Frommert* Petitioners make a series of scattershot arguments that the Second Circuit failed to take into account various principles of federal common law in enforcing the releases. The common theme that unites these arguments is the assertion that the Second Circuit misapplied the correct rule of law to the particular facts of this case. Even if Release Petitioners were correct – and they are not – this Court should not review the Second Circuit's application of the correct rule of law to a particular set of facts.

The *Frommert* Petitioners also argue that the Second Circuit erroneously failed to apply certain technical provisions of a statute governing the release of age discrimination claims to their release of their ERISA claims. Decisions of this Court and every Circuit to address the question, however, make clear that the statute does not apply to non-age discrimination claims. Moreover, the releases in question fully complied with the statutory

requirements relied on by Release Petitioners. The *Frommert* Petition therefore should be denied.

1. Each of the Plaintiffs in the underlying lawsuit worked for Xerox for a period of time, left Xerox's employ, and later was rehired by Xerox. (*Frommert* Pet. App. 23a.) When Plaintiffs' initial period of employment with Xerox ended, they received lump sum distributions of benefits from the Plan. (*Id.*) They each resumed earning benefits upon being rehired. (*Id.*) To avoid giving such rehired employees double credit for their initial period of service, the Plan provides that the pension benefits of rehired employees must be reduced, or "offset," by the value of their prior benefit distributions.

This lawsuit arises from a challenge to one of the two Plan provisions governing the calculation of this offset – a provision that the Second Circuit referred to as the "phantom account" offset provision. In 2004, the District Court issued a summary judgment rejecting Plaintiffs' challenge to that provision. In 2006, the Second Circuit reversed the District Court in part, holding that the "phantom account" offset provision was not fully disclosed to Plan participants until 1998. (*Id.* at 6a.) The Second Circuit did not find that the provision was unlawful or substantively unfair; it held only that the provision was not fully disclosed in the manner required by ERISA prior to 1998. It remanded the case to the District Court with instructions to recalculate Plaintiffs' benefits under the Plan without reference to the "phantom account" offset provision. (*Id.*)

On remand, the District Court in 2007 held that the Plan – excised of the provision in question – permits the Plan to offset a rehired employee's benefit only by the *nominal* amount of the employee's prior distribution, without accounting for the time value of money. (*See id.* at 30.) Plaintiffs' own expert recognized that this result conferred a windfall on rehired employees. (A. 484.)[1] The Second Circuit nevertheless affirmed this holding of the District Court in the decision below. (*Frommert* Pet. App. 9a).[2]

2. Over the past decade, Xerox has periodically instituted various voluntary and involuntary "reduction in force" programs. Under these programs, participating employees receive up to 52 weeks of salary continuance upon the signing of a general release ("Release"). (*See id.* at 32a.) The *Frommert* and *Pietrowski* Petitions arise from the fact that 18 individual Plaintiffs signed Releases during the pendency of this action. (*Id.* at 13a-14a n.3.)

The Releases expressly provided that the employees released "Xerox from *any and all claims . . . based on anything that has occurred prior to the date [they] sign[ed] th[e] release.*" (*Id.* at 14a (emphasis added).) The term "Xerox" in the Release

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[1] References to "(A. __)" are to Appellants' Appendix, submitted below.

[2] That holding is the subject of a separate petition for a writ of certiorari filed by the Plan and its Plan Administrators. (*See* Dkt. No. 08-810.)

is defined to include, among other entities, the "Xerox employee benefit plans" and their administrators. (*Id.* at 33a-34a n.2.)

The Release counseled employees to take sufficient time in deciding whether to sign the Release, gave them 45 days to consider the Release before returning it to Xerox, and gave them another seven days to revoke the Release after signing it. (*Id.* at 82a.) The Release also expressly advised employees to consult with an attorney before signing the Release. (*Id.* at 81a.)

3. In January 2001, counsel for Plaintiffs in this lawsuit filed an "emergency" motion asking the District Court to enjoin Xerox from seeking a release of Plaintiffs' claims. In support of that motion, Plaintiffs' counsel submitted an affidavit stating that he had consulted, among others, with each of the Release Petitioners who was then a party to this action regarding the Release. (*See* A. 49.)

As Plaintiffs' counsel acknowledged in his affidavit, the Releases "explicitly include[d] a release of all claims under ERISA" and, in particular, encompassed Plaintiffs' claims "for recalculation of retirement benefits under ERISA." (*Id.* at 47-48.) For that reason, Plaintiffs' counsel suggested that his clients seek permission from Xerox to "sign a general release which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." (*Id.* at 49-50.) Specifically, Plaintiffs' counsel suggested adding the following language to the Release: "This release does not intend to and does not release any claim the undersigned has

asserted or will assert for recalculation of retirement benefits" under the Plan. (*Id.* at 67.) According to the affidavit, however, Plaintiffs who brought this revised language to the attention of Xerox were informed that they would not be eligible for salary continuance "unless they execute[d] the general release in the form provided by Xerox." (*Id.* at 50.)

The District Court denied Plaintiffs' "emergency" motion regarding the release issue in January 2001. (*Frommert* Pet. App. 33a.)

4. By 2006, a total of 22 *Frommert* Plaintiffs had signed Releases that were accepted by Xerox. (A. 1047-48.) Four of those individuals had altered the forms provided to them to carve out the *Frommert* lawsuit from the scope of the released claims.[3] Although Xerox's acceptance of the four modified releases was inadvertent, Respondents conceded below that the claims of these four individuals are not barred. (*Frommert* Pet. App. 13a-14a n.3.) Thus, the instant dispute concerns only the Releases signed by the remaining 18 Release Petitioners.

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[3] Those four individuals did so by inserting the italicized language below:

> I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, *including any right to a pension under the Xerox Retirement Pension Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit.*

(*Frommert* Pet. App. 34a.)

In November 2006, Respondents filed a motion for summary judgment seeking to enforce the Releases. (*See* A. 1051.) In support of that motion, Respondents submitted, pursuant to Local Rule 56.1, a Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried ("Rule 56 Statement"). Respondents' Rule 56 Statement, among other things, averred that each of the Plaintiffs was "educated and worked in salaried positions at Xerox for many years" and that each was "represented by counsel" in this lawsuit at "the time the[y] signed the releases." (*Id.* at 1048-49.)

In responding to that motion, Release Petitioners did not submit any additional facts or in any way controvert the facts set forth in Respondents' Rule 56 Statement and supporting affidavits. Indeed, Release Petitioners acknowledged in their brief that "the plan participants who signed general releases had available to them counsel who had been a part of this case since November 1999." (A. 1103.) Release Petitioners argued only that the Releases by their terms were unenforceable in this case.

5. In its 2007 decision, the District Court denied Respondents' motion for summary judgment on the release issue. The District Court recognized that plan participants may knowingly and voluntarily waive ERISA claims. (*Frommert* Pet. App. 34a-35a (citing, *inter alia*, *Laniok* v. *Advisory Committee of Brainerd Manufacturing. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991)).) It further recognized that, in order to determine whether a waiver is knowing and voluntary, courts must consider the

"totality of the circumstances," including but not limited to

> (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7) whether the employer encouraged the employee to consult an attorney; and (8) whether the employee had a fair opportunity to do so. [hereinafter, the "*Laniok* factors"]

(*Frommert* Pet. App. 35a-36a.)

The District Court, moreover, acknowledged that a number of the *Laniok* factors, "such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases." (*Id.* at 36a.) However, it held that other factors, "particularly the clarity of the release and the consideration given by Xerox in exchange for the releases," rendered the Releases unenforceable. (*Id.*)

The District Court's holding that the Releases were insufficiently clear was based primarily on

Release language stating that "the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." (*Id.* at 34a.) According to the District Court, this language arguably carved out Release Petitioners' claims from the scope of the Release because the Second Circuit had determined in its 2006 decision that Release Petitioners were "entitled by law" to benefits calculated without reference to the so-called "phantom account" offset provision. (*Id.* at 37a-38a.)

The District Court also held that the "consideration given by Xerox in exchange for the releases" militated against their enforcement. (*Id.* at 36a.) Specifically, the District Court observed that, under the Older Workers Benefit Protection Act ("OWBPA"), an "individual may not waive any right or claim under [the Age Discrimination in Employment Act ("ADEA")] unless the waiver is knowing and voluntary," which for OWBPA purposes requires, among other things, that the "the individual waive[] rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." (*Id.* at 37a (quoting 29 U.S.C. § 626(f)).) According to the District Court, the Releases were unenforceable in part because "the consideration received by [Release Petitioners], *i.e.*, salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." (*Id.* at 41a.)

6. In its 2008 decision, the Second Circuit reversed the District Court on the release issue. It began by citing the two leading Second Circuit cases

regarding the waiver of ERISA claims – *Finz* v. *Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), and *Laniok* v. *Advisory Committee of Brainerd Manufacturing. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991) – for the proposition that "an individual can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver 'is made knowingly and voluntarily.'" (*Id.* at 15a.) (citations omitted).) It then recited the same non-exhaustive list of *Laniok* factors cited by the District Court. (*Id.* at 16a.) Unlike the District Court, the Second Circuit concluded, after "reviewing the undisputed facts pertaining to these releases under the totality of the circumstances," that Release Petitioners knowingly and voluntarily gave the Releases. (*Id.* at 19a.)

As part of its totality-of-the-circumstances analysis, the Second Circuit concluded that "the explicit and broad language in the release form" – which released Respondents from "any and all claims" arising prior to the giving of the Release – unambiguously covered Release Petitioners' claims. (*Id.* at 14a, 16a.) In so holding, the Second Circuit rejected the District Court's argument that the "entitled by law" language narrowed the scope of the Release. As the Second Circuit explained, that argument "conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." (*Id.* at 17a-18a.)

The Second Circuit also rejected the argument that the Releases were unenforceable because the consideration provided in exchange for them was less than what Release Petitioners otherwise would have

received under the District Court's subsequent benefits calculation. As the Second Circuit explained, "neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs[] likely expected at that time [they signed the Releases] can render the[] releases unenforceable." (*Id.* at 19a.)

Finally, the Second Circuit considered the District Court's conclusions that "the releases failed to comply with a provision of the [OWBPA] and that such noncompliance has relevance to the determination of whether [Release Petitioners] released Xerox from ERISA-based claims." (*Id.* at 18a n.4.) The Second Circuit declined to examine whether in fact the Releases violated the OWBPA, instead holding that "such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was 'knowing and voluntary.'" (*Id.*)

REASONS FOR DENYING THE PETITIONS

I. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "GROUP STANDARD" QUESTION.

The *Pietrowski* Petitioners (Dkt. No. 08-826) urge this Court to grant the writ because the Second Circuit purportedly adopted a new "group standard" for evaluating the validity of releases under ERISA that "moots inquiry into the particular circumstances attending each individual releasor's execution of the release." (*Pietrowski* Pet. at 15a-16a.) In fact, the Second Circuit did no such thing. Rather, it recited

and applied the very same totality-of-the-circumstances test that the Second Circuit and other courts of appeals have long employed in evaluating the release of ERISA claims. This case accordingly does *not* present a conflict among the Circuits regarding any question of law. Rather, at best, Release Petitioners disagree with the Second Circuit's application of a well-established rule of law to the particular facts of this case. Certiorari is therefore unwarranted.

Release Petitioners, moreover, neither came forward with any individualized facts in opposing Respondents' motion for summary judgment in the District Court nor argued to the Second Circuit that a remand for additional factual development might be required. Accordingly, Release Petitioners waived the argument that a remand was required, and the decision of the Second Circuit, in light of the undisputed factual record before it, was plainly correct. The Petition should be denied for these reasons as well.

A. The Second Circuit Did Not Adopt A New "Group Standard" For Reviewing Releases Of ERISA Claims.

In *Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992), the Second Circuit held that "waiver of pension benefits is subject to closer scrutiny than . . . waiver of general contract claims" and therefore "required close inspection of the totality of circumstances surrounding a waiver of ERISA benefits" in order to ensure that the waiver is knowing and voluntary. *Id.*

at 81 (citing *Laniok* v. *Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991)). The Second Circuit also observed that the *Laniok* factors, while "not exhaustive," "may be examined" as part of the totality-of-the-circumstances analysis. *Finz*, 957 F.2d at 81.

As the *Frommert* Petitioners acknowledge, "the Second Circuit applied the factors set forth in *Laniok*" in the decision below. (*Frommert* Pet. at 17.) Indeed, contrary to the *Pietrowski* Petitioners' suggestion, the Second Circuit expressly considered not only the language of the Releases, but also the other relevant *Laniok* factors – including, for example, the consideration given to Release Petitioners and the amount of time that Release Petitioners were given to decide whether to sign the Releases. (*Pietrowski* Pet. App. 22a.) Only then did the Second Circuit conclude, after "*reviewing the undisputed facts pertaining to the[] releases under the totality of the circumstances*," that the Releases are enforceable. (*Id.* at 21a (citing *Finz*, 957 F.2d at 82) (emphasis added).)

Unable to find any support for the proposition that the Second Circuit rejected the well-established totality-of-the-circumstances test in favor of a new "group standard," Release Petitioners instead seek to divine the "group standard" from an *amicus* brief offered in support of Respondents. That amicus brief, according to Release Petitioners, urged the Court to adopt a rule under which "form releases affecting large numbers of laid off workers . . . should trump individualized process." (*Pietrowski* Pet. at 16a-17a.) Notably, however, Release Petitioners do not – and

cannot – cite any language in the Second Circuit's decision adopting such a test.

To the contrary, the Second Circuit expressly recited a rule of law that takes into account, as part of the totality of the circumstances, both the language of the release *and* the individual circumstances of the employees who signed the release. (*Pietrowski* Pet. App. 17a-18a.) Release Petitioners themselves concede that this is both the correct rule of law and the rule of law applied by other courts of appeals. (*Pietrowski* Pet. at 12-13.) Their quibble with the way that the Second Circuit *applied* this rule of law to the particular circumstances of this case does not warrant this Court's review.

B. Release Petitioners Waived The Argument That Additional Evidence Is Required In Order To Determine The Validity Of Their Releases.

The *Pietrowski* Petitioners argue that the Second Circuit should have remanded for further development of the factual record regarding their individual circumstances. But Release Petitioners failed to make this argument below. Accordingly, even if their Petition presented an important or controversial question of law (and it does not), this case would be a poor vehicle for resolving any such question.

In the decision below, the Second Circuit reversed the District Court and held that Respondents were entitled to summary judgment on the release issue.

Release Petitioners now for the first time argue that summary judgment was inappropriate because additional fact-finding was required. According to Release Petitioners, the Second Circuit should have "remand[ed] the case to the district court" rather than reverse the District Court on the release issue. (*Pietrowski* Pet. at 8.)

Release Petitioners, however, at no point argued – either in the District Court or the Second Circuit – that additional fact-finding would be necessary were either court to reject their legal arguments regarding the Release language. Having failed to argue below that a remand for additional fact-finding was required, Release Petitioners have failed to preserve this issue for decision by this Court. *See Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that "was inadequately preserved in the prior proceedings"). Certiorari is therefore unwarranted.

C. The Second Circuit Reached The Correct Result In Light Of The Factual Record Before It.

Contrary to *Pietrowski* Petitioners' assertions, the record before the Second Circuit included facts regarding the individual circumstances of each Release Petitioner. These facts, moreover, were undisputed, as Release Petitioners failed to offer any evidence in response to Respondents' factual showings. In light of the undisputed factual record provided by Respondents, the decision of the Second Circuit was correct.

After this case was remanded to the District Court in 2006, Respondents moved for partial summary judgment, asserting that Release Petitioners' claims were barred by the Releases. (A. 1051 *et seq.*) In support of that motion, Respondents came forward with evidence regarding each of the *Laniok* factors (other than the clarity of the release, which is a pure question of law). Specifically, Respondents adduced evidence showing that Release Petitioners (1) were "educated and worked in salaried positions at Xerox for many years," (2) had ample time (45 days) to consider whether to sign the Releases, (3) received significant consideration in exchange for the Releases, (4) were encouraged by Xerox to consult an attorney before signing the Releases, and (5) were represented by counsel at the time they signed the Releases. (A. 1047-49.)[4] Respondents also demonstrated that Plaintiffs' counsel had advised his clients that the Releases in fact would bar their claims in the ongoing *Frommert* litigation. (*Id.*)

Respondents presented a *prima facie* case that the Releases were knowingly and voluntarily given, thereby satisfying their burden on summary judgment.[5] Release Petitioners were therefore

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[4] Respondents conceded that Release Petitioners had no role in deciding the terms of the release.

[5] *See, e.g.*, *Houghton* v. *South*, 965 F.2d 1532, 1536 (9th Cir. 1992) ("Where, as here, the moving party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." (quoting *International Shortstop, Inc.* v. *Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991))).

obliged to come forward with whatever evidence they had to defeat Respondents' summary judgment motion. *See* Fed. R. Civ. P. 56(e)(2) ("When a motion for summary judgment is properly made and supported, an opposing party . . . must . . . set out specific facts showing a genuine issue for trial.").[6] But Release Petitioners failed to come forward with *any* evidence regarding their individual circumstances in opposing summary judgment. Nor did they dispute any of the facts adduced by Respondents. Thus, each of the facts adduced by Respondents must be accepted as true, and Release Petitioners are not entitled to ask for consideration of additional facts that were not presented in response to the summary judgment motion. *See* Fed. R. Civ. P. 56(c).

Release Petitioners' assertion that the Second Circuit failed to consider their individual circumstances is therefore incorrect. The Second Circuit decided the release issue based upon the "undisputed facts" provided by Respondents concerning the circumstances of each Release Petitioner. For instance, while Release Petitioners assert that the Second Circuit failed to take into account "the specific education and business experience of individual releasors" (*Pietrowski* Pet. at 20), the "undisputed facts" in the record on summary

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[6] *See also, e.g., Irby* v. *Bittick*, 44 F.3d 949, 953 (11th Cir. 1995) ("Once a moving party has sufficiently supported its motion for summary judgment, the non-moving party must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact.").

judgment included the facts that "*[e]ach* of the[] [Release Petitioners] are educated and worked in salaried positions at Xerox for many years" (A. 1048 (emphasis added)).[7]

Virtually every *Laniok* factor weighed in favor of enforcing the Releases, and Release Petitioners failed to present any evidence suggesting that the Releases were unknowing or involuntary. Accordingly, based on the undisputed factual record before it, the decision of the Second Circuit was correct. Further review is unwarranted.

II. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "FEDERAL COMMON LAW" QUESTION.

The *Frommert* Petitioners (Dkt. No. 08-803) assert – on the facts of this case and in light of the precise language used in the Releases – that the Second Circuit erred in enforcing the Releases signed by Release Petitioners. Notably, they do *not* argue that the Second Circuit employed an incorrect legal standard – let alone a legal standard that is in

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[7] Release Petitioners note that four Plaintiffs carved out the *Frommert* lawsuit from their Releases and that those Releases were accepted by Xerox without any reduction in consideration. (*Pietrowski* Pet. at 19.) According to Release Petitioners, some of their number might have learned of these facts and, if so, "may have concluded" that "*Xerox itself* interpreted the general release to *not* encompass" the *Frommert* litigation." (*Id.* at 20.) This argument is wholly speculative and unsupported by record evidence. It also ignores the undisputed fact that Xerox's acceptance of the adulterated Releases was inadvertent. (*See* Appellants' Brief at 21 n.5.)

conflict with a decision of any other Circuit. To the contrary, Release Petitioners point to the Second Circuit's prior *Finz* and *Laniok* decisions as correctly stating the legal standards governing the enforceability of releases of ERISA claims. (*Frommert* Pet. at 9-10 & n.3, 12.) Accordingly, further review is not warranted.

1. Release Petitioners are unable to point to any rule of law misstated by the Second Circuit. Indeed, Release Petitioners concede that the totality-of-the-circumstances test recited by the Second Circuit is both correct and entirely consonant with decisions of the other Circuits. (*See id.*) Release Petitioners' argument instead boils down to an assertion that the Second Circuit did not properly interpret the language used in the Releases and therefore misapplied the governing legal standard to the facts of this case.

The Releases in question state that Release Petitioners release Respondents from "any and all claims . . . based upon anything" that occurred prior to the signing of the Releases. (*Frommert* Pet. App. 14a.) Release Petitioners, however, argue that the Releases do not bar their claims because of the following Release language: "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." (*Frommert* Pet. at 6.) According to Release Petitioners, because they are "entitled by law" to a calculation of benefits that is not premised upon application of the so-called "phantom account" offset provision, the Releases do not bar their claims in this case. (*See id.* at 14.)

As the Second Circuit explained, this argument "conflate[s] the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." (*Frommert* Pet. App. 17a-18a.) Moreover, Release Petitioners' argument that the Second Circuit misapplied the above-quoted Release language to the unique facts of this case does not present an important and recurring issue of federal law requiring this Court's review. The Petition should therefore be denied. *See* Sup. Ct. R. 10.

2. In an attempt to escape this conclusion, Release Petitioners assert that the decision below violated "federal common law" and various "principle[s] of contract interpretation." (*Frommert* Pet. at 12.) Notably, however, each of the principles cited by Release Petitioners is entirely consistent with the totality-of-the-circumstances test applied by the Second Circuit.

Release Petitioners first argue that "the validity of an individual's waiver of pension claims should be subjected to closer scrutiny than waiver of general contract claims." (*Frommert* Pet. at 12 (citing *Finz*, 957 F.2d at 81).) The decision of the Second Circuit is not in conflict with this principle. To the contrary, the Second Circuit held that the Releases were given knowingly and voluntarily only after citing the *Finz* decision for an "articulat[ion]" of the "relevant" law. (*Frommert* Pet. App. 19a (citing *Finz*, 957 F.2d at 82).)

Release Petitioners further argue that a release "drafted by the employer . . . must be construed in

favor of the employee." (*Frommert* Pet. at 13.) The identity of the drafter, however, is among the *Laniok* factors that the Second Circuit indisputably applied in this case. *See* 935 F.2d at 1368 (listing "the role of plaintiff in deciding the terms of the agreement" as among the relevant factors in determining whether a release is knowing and voluntary). This rule of construction, moreover, is irrelevant where the language in question is unambiguous, as the Second Circuit held the Releases were here.[8]

According to Release Petitioners, another relevant "principle of contract interpretation . . . is that courts must ensure that federally protected rights are 'not undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives.'" (*Frommert* Pet. at 12 (citation omitted).) But Release Petitioners are unable to point to any conflict between this alleged

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[8] Release Petitioners also suggest that the Releases were ambiguous because they did not specifically reference the *Frommert* lawsuit (*Frommert* Pet. at 11), but there is no requirement that a specific action – or cause of action – must be expressly referenced in order to be covered by a release, *see generally Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002) (rejecting argument that "for a release to cover an ERISA claim, it must specifically mention ERISA"). The Releases here released "Xerox from any and all claims . . . based upon anything that has occurred prior to the date [he or she] sign[s] the release." (*Frommert* Pet. App. 14a.) This language plainly covered the *Frommert* lawsuit, as evidenced by the fact that Plaintiffs' counsel advised his clients that the Releases covered their claims for recalculation of pension benefits. (*See* A.47-50.)

rule of construction and the Second Circuit's conclusion, in light of the "undisputed facts" and the "totality of the circumstances," that the Releases should be given effect. (*Frommert* Pet. App. 19a.) Release Petitioners also overlook the fact that they were represented by counsel when they signed the Releases, thereby negating any inference that they lacked "information regarding their legal alternatives." (A. 1049.)

Finally, Release Petitioners assert that the decision below improperly "places the burden" of proof "on plan participants to establish that the release form was not a knowing and voluntary waiver." (*Frommert* Pet. at 9.) Release Petitioners, however, fail to cite any portion of the Second Circuit opinion that does so.

In sum, the decision of the Second Circuit is entirely consistent with the various interpretive principles cited by Release Petitioners. While Release Petitioners assert that the Second Circuit incorrectly applied those principles as part of its totality-of-the-circumstances analysis, nothing in the decision below supports that assertion. Ultimately, Release Petitioners do no more than disagree with the Second Circuit's interpretation of the specific release language at issue and its application of an uncontested legal standard to the particular facts of this case. Their Petition should thus be denied. *See* Sup. Ct. R. 10.

III. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "OWBPA" QUESTION.

The *Frommert* Petitioners also argue that failure to comply with the technical requirements of the OWBPA should render the release of ERISA claims invalid in cases where the release also purports to apply to ADEA claims. (*Frommert* Pet. at 15.) This Court rejected that argument in *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). Moreover, the Releases at issue here fully complied with the OWBPA. Further review of the Second Circuit's OWBPA holding is thus unwarranted.

A. The OWBPA Requirements For Releases Do Not Apply To ERISA Claims.

In 1990, Congress amended the ADEA by passing the OWBPA. The OWBPA provides that "[a]n individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). It then sets forth certain technical requirements that employers must meet in order for a release to be deemed "knowing and voluntary" under the ADEA. *See id.* The requirements include, for example, notification of "the job titles and ages of all individuals eligible or selected for" an exit incentive program. *Id.* at § 626(f)(1)(H)(*ii*).

In *Oubre*, this "Court repeatedly stated that the OWBPA applies *only* to ADEA claims, *and no others*." *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 375 (5th Cir. 2002) (emphasis added). For

instance, the Court expressly contemplated circumstances "where a release is effective as to some claims but not as to ADEA claims." *Oubre*, 522 at 428; *accord Chaplin*, 307 F.3d at 375 ("The Court expressly conceived a case in which a release might bar all claims but an ADEA claim because the release did not comply with the OWBPA.").[9]

Release Petitioners assert that age discrimination claims under the ADEA "should not logically receive a higher degree of protection than an employee's contractual right to a pension." (*Frommert* Pet. at 15.) As this Court made clear, however, the technical requirements set out in the ADEA reflect Congress' judgment that age discrimination claims do deserve greater (or at least different) protections than other claims. *See Oubre*, 522 U.S. at 427 ("The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word."); *see also id.* (stating that the regime implemented by the OWBPA is entirely "separate and apart from contract law"). Accordingly, Release Petitioners' appeal to "logic" is at odds with

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[9] *See also Oubre*, 522 U.S. at 426-27 ("The statutory command is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."); *id.* at 427 ("An employee 'may not waive' an ADEA claim unless the employer complies with the statute."); *id.* ("The OWBPA governs the effect under federal law of waivers or releases on ADEA claims."); *id.* at 428 ("As a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of the contract as to other claims."); *id.* ("It suffices to hold that the release cannot bar the ADEA claim."); *id.* ("The statute governs the effect of the release on ADEA claims.").

the legislative judgment reached by Congress in the OWBPA.[10]

Given this Court's holding in *Oubre*, Release Petitioners unsurprisingly cannot point to any conflict in the courts of appeals regarding the applicability of the OWBPA to the release of ERISA claims. No such conflict exists; the Circuits that have considered the issue agree with the Second Circuit that the OWBPA is irrelevant to the question whether a release of non-ADEA claims is knowing and voluntary. *See, e.g.*, *Chaplin*, 307 F.3d at 375-76 ("The language of *Oubre* precludes plaintiffs' argument that the OWBPA applies to a release of an ERISA claim."); *Blackwell* v. *Cole Taylor Bank*, 152 F.3d 666, 673 (7th Cir. 1998) ("There is no counterpart in Title VII land to the [OWBPA], and so [plaintiff]'s waiver of her claim of race discrimination was valid as long as it met the usual criteria for an effective waiver, that is, as long as it was knowing and voluntary.").

In sum, Release Petitioners' argument is inconsistent with a decision of this Court and has been rejected by every Circuit to consider the issue. The writ therefore should be denied.

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[10] Logic, moreover, in no way dictates that various technical requirements under the OWBPA – such as the requirement that employees receive notice of the ages of the individuals eligible to participate in early retirement programs – should have any relevance in determining whether the waiver of an ERISA claim is knowing and voluntary.

B. The Releases At Issue Here Do Not Violate The OWBPA.

Release Petitioners assert that the Releases at issue here violate the OWBPA requirement that an employee waive "rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." 29 U.S.C. § 626(f)(1)(D). This is because, according to Release Petitioners and the District Court, "the consideration received by [Release Petitioners], *i.e.*, the salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." (*Frommert* Pet. App. 41a.) This contention misses the mark.

The interpretation of the OWBPA advocated by Release Petitioners would require courts – in evaluating whether a release complies with the OWBPA – to determine on a case-by-case basis whether the consideration provided for the release exceeds the value of the released claims.[11] The OWBPA does not require this extraordinary result.

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[11] For example, consider an employee who provides a release of an age discrimination claim in exchange for $10,000. Under Release Petitioners' theory, the release would be invalid if the employee was "already . . . entitled" by law to an amount exceeding $10,000. The employee's entitlement, moreover, would be measured on Release Petitioners' theory not only by reference to mature and acknowledged obligations but also to contested and indeterminate obligations, including those arising out of the employee's age discrimination claim itself. In other words, if it turned out that the employee was "legal entitled" to back pay in an amount exceeding $10,000, the release would be ineffective.

Rather, the purpose of the OWBPA requirement is to ensure that a release is not given gratuitously. In other words, the OWBPA merely (1) requires that a release be supported by consideration, and (2) underscores that the consideration cannot be illusory but instead must be "in addition to anything of value" to which the employee already has an acknowledged entitlement.

As the Second Circuit cogently observed, "neither the uncertainty of [Release Petitioners' pension] benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the[y] likely expected at that time [they signed the Releases] can render the[] releases unenforceable." (*Frommert* Pet. App. 19a.) When Release Petitioners' signed the Releases, they received substantial consideration – in the form of a salary continuance – in exchange for a release of "any and all claims," including their contested claims for additional retirement benefits in this action. At that time, they had no legal entitlement to pension benefits recalculated in the manner eventually ordered by the District Court; rather, the proper method of calculating their pension benefits was (and remains) disputed. As such, the consideration they received in exchange for the Releases plainly exceeded anything to which they already were "entitled by law" at the time they signed the Releases.

In sum, because the Releases signed by Release Petitioners clearly comply with the in-any-event irrelevant provision of the OWBPA on which Release Petitioners rely, further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

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Nos. 08-803 & 08-826

IN THE
Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL.,
Petitioners,

AND

KENNETH PIETROWSKI, ET AL.,
Petitioners,

v.

SALLY CONKRIGHT, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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May 12, 2009

AMENDED LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petition for a writ of certiorari in No. 08-803 correctly identified all the parties that participated in the proceedings below but did not separately set forth those specific individuals who are petitioners here and who are seeking relief from the Second Circuit's decision below. Those 14 individuals are:

Matthew D. Alfieri
Lynn Barnsdale
Bruce D. Craig
Richard C. Crater
John L. Crisafulli
Charles R. Drannbauer
James D. Gagnier
Carol E. Gannon
Janice R. Heiler
Gerald A. Leonardo, Jr.
Andrew C. Matteliano
Walter J. Petroff
Irshad Quershi
Joseph E. Wright

In all other respects, the list of parties in the certiorari petition is correct.

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Petitioners in *Alfieri v. Conkright*, No. 08-803, and *Pietrowski v. Conkright*, No. 08-826 (collectively, "the Participants"), a group of current and former employees in the Xerox Corporation Retirement Income Guarantee Plan ("the Plan," a respondent), submit this supplemental brief[1] to present arguments based on this Court's recent decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009). In light of *Kennedy*, it is now clear that the court of appeals labored under a basic misunderstanding of the appropriate relationship between the terms of an ERISA plan and an agreement that purports to waive rights to receive benefits under the terms of the plan. In *Kennedy*, this Court held that such a waiver cannot be given effect when doing so would contravene ERISA's several textual directives that benefits be paid according to the documents that comprise the plan. The Court's reasoning further relied on the policy concern those directives embody: a strong federal interest in uniform and efficient plan interpretation without reference to extraneous documentation that must be evaluated under contestable standards.

ERISA's text is equally controlling in this case. As challenged here, the judgment of the court of appeals rests on its conclusion (contrary to that of the district court) that certain reduction-in-force agreements signed by the Participants waived all claims that they held against the Plan and its administrators ("the Plan Administrators," respondents). Because of those waivers, the court of appeals held that,

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[1] Supplemental briefing is appropriate under this Court's Rule 15.8 because *Kennedy* was handed down on January 26, 2009, and therefore was not available at the time of the Participants' last filing in this docket on December 23, 2008.

even though the Plan Administrators had previously violated ERISA by paying lower benefits than the controlling plan documents require (a violation that respondents do not now dispute), the Participants now have no remedy for that violation, and the Plan and its Administrators may continue to pay the Participants lower benefits than the applicable documents specify. That is just the opposite of what ERISA, as interpreted in *Kennedy*, requires.

The rule adopted by the court of appeals also runs contrary to ERISA's policies as explained in *Kennedy*. That rule contemplates that, before determining what benefits to pay a plan participant or beneficiary, plan administrators will not only seek out and construe termination agreements between participants and their employers for waivers of ERISA rights, but also determine whether those waivers were knowing and voluntary. Such a lengthy and uncertain process will impede the timely collection of benefits — or, alternately, will result in arbitrary enforcement of waivers in a limited set of cases against only some participants and beneficiaries.

This Court should grant the petitions for a writ of certiorari, vacate the decision below insofar as the court of appeals held that the Participants had waived their claims, and remand that aspect of the case for reconsideration in light of *Kennedy*. In the alternative, *Kennedy* provides an additional reason for plenary review of the decision below, as the decision of the court of appeals now conflicts with a recent decision of this Court on a question of nationwide importance.

I. *KENNEDY* UNDERMINES THE DECISION OF THE COURT OF APPEALS

In *Kennedy*, this Court confronted the question whether a plan administrator should give effect to a waiver of rights to receive pension benefits under an ERISA plan as a beneficiary when that waiver is not a qualified domestic relations order of the kind described in 29 U.S.C. § 1056(d)(3). Before the Court granted review on that question, the majority view among the circuits had been that such waivers should be given effect if the waiver had been voluntary as evaluated under federal common law. *See, e.g., Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1326-27 (5th Cir. 1994), *cited in Kennedy*, 129 S. Ct. at 870 n.5. In *Kennedy*, however, the Court rejected that view and held that a plan administrator must instead pay benefits according to the terms of the plan itself, regardless of whether the person seeking payment has previously signed a waiver that purports to waive the right to receive those benefits. *See* 129 S. Ct. at 874-78.

In reaching that conclusion, the Court relied primarily on the text and structure of ERISA. It found controlling the statute's instructions that a plan must be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which must "specify the basis on which payments are made . . . from the plan," *id.* § 1102(b)(4), and that the plan administrator must act "in accordance with the documents and instruments governing the plan," *id.* § 1104(a)(1)(D), save where those documents conflict with ERISA itself. *Kennedy*, 129 S. Ct. at 875. The Court also relied upon ERISA's policy of creating "a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims

and disbursement of benefits." *Id.* (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)) (internal quotation marks omitted, alteration in original). That policy disfavors "enquiries into nice expressions of intent" and protects the processing of claims from invasion by "a multitude of external documents" or litigation "over the meaning and enforceability of purported waivers." *Id.* at 875, 876 (internal quotation marks omitted).

The court of appeals decided this case without the benefit of *Kennedy*'s exposition of the controlling principles. Had it given those principles proper weight, it would not have reached the same result. Here, just as in *Kennedy*, a purported waiver unmoored in the statute or the plan itself has been interposed as a barrier to the payment of benefits that would otherwise be required under the terms of the plan (and that other plan participants will receive). The court of appeals held that the waiver was enforceable because it was knowing and voluntary — in that court's view, the waiver was clear on its face, the plaintiffs who signed had had time to consider their decision and the opportunity to consult with an attorney, and they received consideration for the waiver. *See* Pet. App. 19a-20a.[2] The court reached that conclusion despite its prior holding (unchallenged in this Court) that the Plan Administrators had badly misread the terms of the pre-1998 plan and had failed to pay the Participants the benefits to which, under the Plan documents, they were entitled. *See id.* at 6a.

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[2] Citations to "Pet. App." refer to the appendix to the petition in No. 08-803.

The decision below thus recognizes the purported waivers signed by the Participants as a "basis on which payments [may be] made . . . from" — or not made from, which amounts to the same thing — "the plan," 29 U.S.C. § 1102(b)(4), and as an unwritten exception to the respondent Administrators' obligation to act "in accordance with the documents and instruments governing the plan," *id.* § 1104(a)(1)(D). It therefore cannot be reconciled with a "straightforward rule of hewing to the directives of the plan documents," *Kennedy*, 129 S. Ct. at 875, to determine what benefits to pay to whom. Further, this case, like the one in *Kennedy*, is an "action . . . to recover benefits due . . . under the terms of [the] plan," 29 U.S.C. § 1132(a)(1)(B), a cause of action that "reinforces the directive" that a plan administrator must determine the benefits that are due by reference to the plan itself, *Kennedy*, 129 S. Ct. at 875. The court of appeals has held, and the Plan Administrators do not now dispute, that they have failed to pay benefits due under the Plan. *See* Pet. App. 6a.

Moreover, the rule applied by the court of appeals creates just the same impediments to smooth and efficient plan administration that this Court found unacceptable in *Kennedy*. Consider the case of a former Xerox employee who was *not* a plaintiff in this case, but to whom the Plan Administrators have applied their phantom-account offset. The district court expressed the belief that the offset could not lawfully be applied to such an individual, calling it "beyond dispute . . . that use of a 'phantom account' in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan," and observing that "[i]t is presumed that no plan administrator would knowingly violate ERISA."

Id. at 47a n.9. Yet, under the rule applied by the Second Circuit, the Plan Administrators could still apply their unlawful offset if (but only if) the employee had knowingly and voluntarily waived his or her rights in the interim. To make that determination, the Plan Administrators would need to determine that the waiver had been made in the first place; determine whether by its terms it encompassed the claim that they had violated ERISA by applying the phantom-account offset contrary to the plan documents; and apply a nonexhaustive multifactor test to determine whether the waiver had been knowing and voluntary. *See id.* at 15a-16a (the court of appeals, citing *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), which applied six factors); *id.* at 35a-36a (the district court, citing *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 402-03 (2d Cir. 1989), which applied eight factors).[3]

Doing these things is not straightforward, as the history of this case demonstrates. The language of the waivers provided that the "consideration set forth in this Release [was] in addition to anything of value to which [a Participant is] entitled by law or Xerox policy." *Id.* at 80a (internal quotation marks omitted). The district court and the court of appeals disagreed about whether this language made the waivers ambiguous. The district court correctly observed

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[3] As set forth in the petitions (No. 08-803, at 8-11; No. 08-826, at 18), the court of appeals departed from governing principles of federal common law in its application of the factors set forth in *Finz*, in *Laniok v. Advisory Committee of Brainerd Manufacturing Co. Pension Plan*, 935 F.2d 1360 (2d Cir. 1991), and in other cases. Clarification of these principles remains of sufficient national importance to warrant plenary review. *Kennedy*, however, calls sharply into question whether those principles were even properly invoked in this case.

that this language "suggests that [the Participants] did *not* waive any then-pending claims alleging an entitlement to some particular benefits," *id.* at 40a, and that, in light of the court of appeals' earlier holding, the Participants "were 'entitled by law' not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a 'phantom' account," *id.* at 38a. The court then applied the established rule that "any ambiguity [in the waivers] should be resolved against Xerox, which drafted" them, *id.* at 39a, and held that they did not bar the Participants' claims.

The court of appeals, however, disagreed, reasoning that the language on which the district court relied dealt only with "the existence of consideration adequate to render a release enforceable," and not to "the scope of claims thereby released." *Id.* at 17a-18a. It apparently believed that, so long as the Plan Administrators had not "den[ied] [the Participants] any and all pension benefits," *id.* at 18a, they had given the Participants what they were entitled by law to receive under the terms of the waiver. This Court need not address the merits of that implausible conclusion in order to observe that federal judges disagree over the proper reading of the waivers' terms. That disagreement is potent evidence that the court of appeals' rule, like the one rejected in *Kennedy*, would "destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." 129 S. Ct. at 876.

In sum, the rule applied by the Second Circuit is incompatible with this Court's intervening decision

in *Kennedy*.[4] That decision is therefore an "intervening development[] . . . [that] reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"; further, "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Indeed, the stark contrast between *Kennedy*'s model of ERISA litigation and the proceedings in this case demonstrates that there is more than a "reasonable" probability of a different result after remand. The conditions under which this Court will vacate a decision and remand for further consideration are thus fully met.[5]

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[4] The Participants' argument based on *Kennedy* is properly before this Court. The court of appeals held that the Participants' purported waiver of their claims was knowing and voluntary and therefore that "the releases signed by [the Participants] are enforceable." Pet. App. 20a. This reasoning endorsed the proposition that the knowing-and-voluntary standard properly applies to this case under federal common law. "[R]eview of an issue not pressed" below is consistent with this Court's practice "so long as [that issue] has been passed upon." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted, third alteration in original). Similarly, the petitions for certiorari (filed before *Kennedy* was decided) raise the question of the appropriate federal common law principles that apply here. Whether any such principles properly apply is a "predicate to an intelligent resolution" of that question. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) (internal quotation marks omitted).

[5] Vacatur and remand are appropriate only in Nos. 08-803 and 08-826, and the Participants urging vacatur include only those individuals whom the court of appeals held had waived their claims and who are petitioners under those two docket numbers. *Kennedy* has no relevance to the questions presented in No. 08-810. The former and current employees who are respondents there and whose claims have *not* been held waived

II. *KENNEDY* PROVIDES AN ADDITIONAL REASON FOR PLENARY REVIEW

In the alternative, this case is an excellent vehicle for this Court to clarify immediately that its holding in *Kennedy* prohibits the federal courts from giving effect to putative federal common law waivers not merely in the specific context of domestic relations, but whenever such a waiver is interposed as a barrier to the payment of benefits according to the terms of ERISA plan documents. The principles set forth in *Kennedy* apply to both contexts, but it would blink reality to suggest that employers and plans around the country will accept *Kennedy* in cases unrelated to domestic relations without further litigation.

This case presents that broadly significant question in a particularly important fact pattern. Layoffs of the kind that occurred here are regrettably common in today's economic environment, as are termination agreements that purport to waive all claims an employee may have against a former employer in exchange for a severance package, salary continuance, or other financial relief to soften the blow of the layoff. The question whether workers who are laid off and who sign (as practically all do) a standard-form release should obtain the benefit of a judicial determination of the meaning of their pension plan — or, instead, be bound by common law waiver to a plan administrator's erroneous and unlawful construction — is therefore of importance beyond the facts of this case. *See* Pet. 9-11.

For the reasons set forth above, the decision of the court of appeals conflicts with *Kennedy*, a recent

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certainly do not seek vacatur but rather have explained in detail why the petition in No. 08-810 should be denied.

decision of this Court. Further, the appropriate application of *Kennedy* to these facts is an important question of federal law that has not been, but should be, decided by this Court. That is particularly so because of the strong federal interest in the "nationally uniform . . . administration" of ERISA plans, *Egelhoff*, 532 U.S. at 148. Accordingly, if this Court chooses not to vacate and remand for further consideration in light of *Kennedy*, plenary review is appropriate.

CONCLUSION

This Court should grant the petitions for a writ of certiorari in Nos. 08-803 and 08-826, vacate the decision below insofar as the court of appeals held that the Participants had waived their claims, and remand that aspect of the case for further consideration in light of *Kennedy*. In the alternative, those two petitions for a writ of certiorari should be granted and the case should be set for argument on the merits.

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SUPPLEMENTAL BRIEF

Respondents in Nos. 08-803 and 08-826 file this supplemental brief in response to the brief filed by Plaintiffs-Appellees-Petitioners (Release Petitioners) regarding this Court's decision in *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009). As the Government correctly observes, and contrary to Release Petitioners' assertions, *Kennedy* "provides no basis for either plenary review or vacating the decision below and remanding for further proceedings" on the release issue. Br. U.S., at 21.

Kennedy presented the question whether, in determining how to distribute benefits, a plan administrator must give effect to a beneficiary's waiver of benefits that was not executed "in accordance with the [plan] documents." 129 S. Ct. at 875 (quoting 29 U.S.C. § 1104(1)(D)). Emphasizing the importance of minimizing burdens on plan administrators, the Court held that, under ERISA's plan documents rule, a plan administrator may ignore waivers that conflict with plan terms.

This narrow holding is entirely inapposite here, where the Plan is silent on the releases at issue and enforcement of the releases thus does not conflict with Plan terms. Moreover, unlike the waiver in *Kennedy*, the releases here were obtained *for the benefit* of the plan administrator, as they required Release Petitioners to relinquish *disputed* claims to benefits. Precluding their enforcement thus would *disserve* the ERISA goal of minimizing the burden on plan administrators. *See* Br. U.S., at 21

(distinguishing *Kennedy* from this case on the ground that, unlike the waiver in *Kennedy*, "the releases here purport to cover claims against the plan and its administrator, and the release petitioners' entitlement to benefits was in dispute when they signed the releases"). Accordingly, *Kennedy* provides no support for Release Petitioners' petitions, which should be denied.

Review of Release Petitioners' new statutory claim should also be denied because it was not "pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted), and thus, as the Government agrees, "is not properly before this Court," Br. U.S., at 21.

I. *KENNEDY* IS ENTIRELY INAPPOSITE TO THE RELEASES AT ISSUE HERE.

Release Petitioners' contention that the releases are invalid under *Kennedy* is incorrect. Nothing in the language of *Kennedy*, the statutory provisions it construes, or the policies that underlie it calls into question the Second Circuit's decision to enforce the releases signed by Release Petitioners.

1. In *Kennedy*, the Court first considered whether a former spouse's waiver, in the context of a divorce decree, of her right to survivor benefits under her ex-husband's pension plan violated ERISA's anti-alienation provision, 29 U.S.C. § 1056(d), and was therefore *per se* void under ERISA. *Kennedy*, 129 S. Ct. at 873. After holding that such a waiver is not an "inevitable nullity," the Court turned to the question whether the waiver is "effective where [it] is *inconsistent with plan documents*." *Id.* at 870

(emphasis added). The Court concluded that where the plan documents "provide that the plan administrator will pay benefits to a participant's designated beneficiary, with designations and changes to be made in a particular way," the plan need not honor designations or changes that are not made in the required manner. *Id.* at 877.

In reaching this conclusion, the Court relied on a provision of ERISA requiring plan administrators to act "in accordance with the [plan] documents." 29 U.S.C. § 1104(a)(1)(D). The Court explained that this plan documents provision serves "the congressional goal of minimizing the administrative and financial burdens on plan administrators" by enabling plan administrators "to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." *Kennedy*, 129 S. Ct. at 876 (internal quotation marks omitted). By reducing the burdens on plan administrators, the Court observed, the plan documents rule promotes "simple administration, . . . and ensur[es] that beneficiaries get what's coming quickly." *Id.* at 875-76 (internal quotation marks omitted and brackets altered).

Applying the plan documents rule to the facts presented, *Kennedy* upheld the plan administrator's decision to distribute the benefits to the participant's ex-wife because she remained the participant's designated beneficiary and because the plan-prescribed method for disclaiming her interest had not been not followed. *See id.* at 877.

Contrary to Release Petitioners' sweeping assertion, *Kennedy* does not "prohibit[] the federal courts from giving effect to" a release "whenever such a [release] is interposed as a barrier to the payment of benefits according to the terms of ERISA plan documents." Pets. Supp. Br. (Nos. 08-803 & 08-826), at 9. *Kennedy* held only that plan administrators are not required to give effect to waivers that are "inconsistent" with plan terms; it reserved the questions whether a waiver may be enforced "in circumstances in which [the waiver] is consistent with plan documents," 129 S. Ct. at 875 & n.10, or in which the plan simply does not address waiver at all, *see id.* at 877 n.13.

Here, no provision of the Xerox Plan prohibits participants from executing a release of a disputed claim for benefits. While Release Petitioners suggest that they were "entitled by law" to benefits calculated without reference to the phantom account offset methodology (Pets. Supp. Br., at 6-7), their claims were disputed and being actively litigated at the time they gave their releases. *See* Resp. Consol. Br. Opp. (Nos. 08-803 & 08-826), at 4-6; Br. U.S., at 21 (observing that, unlike the waiver in *Kennedy*, "the release petitioners' entitlement to benefits was in dispute when they signed the releases"). Because Release Petitioners' claims to benefits were in dispute, nothing in ERISA or the plan terms precluded them from releasing those claims. *E.g.*, *Stobnicki* v. *Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989) ("[A] controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other.").

Nor does the Plan impose a particular procedure or format for securing a release that was not followed here.[1] Accordingly, *Kennedy* does not address the releases signed by Release Petitioners, much less preclude their enforcement.

2. The main rationale this Court cited for applying the plan document rule in *Kennedy*, moreover, was to minimize the burden on plan administrators faced with conflicting instructions on how to distribute benefits. By allowing plan administrators to ignore extra-plan documents that conflict with plan terms, the Court sought to prevent plan administrators from "be[ing] drawn into litigation" and subject to "double liability" for their benefits determinations. *Kennedy*, 129 S. Ct. at 875-76.

Here, permitting enforcement of the releases that Release Petitioners gave in exchange for severance

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[1] The release itself expressly advised Release Petitioners to consult with an attorney before signing a release, recommended that they take sufficient time in deciding whether to sign a release, gave them 45 days to consider the release before returning it to Xerox, and gave them another seven days to revoke the release after signing it. *See* Resp. Consol. Br. Opp., at 5. Moreover, Plaintiffs' counsel was aware of the releases and understood that their execution would bar his clients' claims: counsel asked the District Court (unsuccessfully) to issue an order barring Defendants from seeking a release of their claims in this case. *See id.* at 5-6.

payments does not encourage litigation against the Plan, much less subject it to double liability. To the contrary, permitting enforcement of releases obtained for the benefit of ERISA plans would discourage litigation and reduce burdens on plan administrators. That the goals the plan documents rule are designed to serve are *advanced* by enforcing the releases illustrates that Release Petitioners' reading of *Kennedy* stretches its holding far beyond the circumstances to which it applies.[2]

3. The implications of Release Petitioners' expansive reading of *Kennedy* are far-reaching. It is well established that releases of disputed claims for ERISA benefits are effective so long as they are knowing and voluntary under the totality of the

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[2] *Kennedy* is also inapposite because the waiver at issue there is fundamentally different from the releases executed here. The designated beneficiary in *Kennedy* purported to relinquish her interest in her ex-husband's pension benefits. That decision thus directly implicated the plan administrator's duty to distribute the benefits as prescribed by the plan. Here, by contrast, the Release Petitioners merely released their right to dispute the way that the Plan Administrator had determined their benefits in the first instance. Thus, while the waiver in *Kennedy* purported to tell the plan administrator how to distribute benefits in the first instance, the releases here merely foreclose a *challenge* to the way the Plan Administrator distributed benefits in the first instance.

circumstances. *See, e.g.*, *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181-182 (1st Cir. 1995); *Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992); *Leavitt* v. *Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). Release Petitioners nevertheless argue that this Court in *Kennedy* overruled this settled precedent without any acknowledgment that it was doing so. In fact, as explained above, *Kennedy* has no bearing on whether an ERISA plan participant may – in exchange for valuable consideration – release a disputed claim for pension benefits. The standard for a valid release has been and remains whether the release was knowingly and voluntarily given, and the Second Circuit properly determined that the releases at issue here were knowing and voluntary on the "undisputed facts" of this case. *See* Resp. Consol. Br. Opp., at 9-10, 15-18.

II. RELEASE PETITIONERS DID NOT RELY ON ERISA'S PLAN DOCUMENTS PROVISION BELOW.

As the Government correctly observes, Release Petitioners' eleventh-hour plan documents claim "is not properly before this Court." *See* Br. U.S., at 21. Release Petitioners did not raise this statutory question in their petitions, and the question is not fairly included within the questions they presented to the Court. Release Petitioners, moreover, have waived their statutory claim because they failed to present it to the courts below – indeed, they presented a *contradictory* claim below. Accordingly, it would be inappropriate for the Court to consider this new statutory question. It would also be

imprudent, because the Court would not have the benefit of the lower courts' treatment of the issue.

1. Supreme Court Rule 14 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." A question that is merely "complementary" or "related" to the question presented in the petition is not "fairly included therein." *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992) (holding that question whether an ordinance affected a regulatory taking was not fairly included within question whether it affected a physical taking) (internal quotation marks omitted). The Court will "consider questions outside those presented in the petition for certiorari . . . only in the most exceptional cases." *Id.* at 535 (citations and internal quotation marks omitted).

Here, the petitions do not assert that the releases are invalid or unenforceable on the ground that they violate any provision of ERISA. Rather, the petitions argue that the Second Circuit incorrectly concluded, as a matter of federal common law, that the releases were knowing and voluntary. The question whether the releases are invalid under ERISA's plan documents provision is "quite distinct, both analytically and factually," from whether the releases were knowingly and voluntarily given. *See Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (declining to entertain "analytically and factually" distinct question). Because Release Petitioners' new statutory claim is not fairly included within their questions presented, review by the Court is inappropriate.

2. Release Petitioners failed to raise the statutory claim not only in their petitions, but also in the courts below. Indeed, by arguing to the courts below that the releases were invalid because they were not knowingly and voluntarily given, Release Petitioners' argument below was *inconsistent* with their new (and novel) assertion that the knowing and voluntary standard does not apply.

As this Court has repeatedly recognized, prudence "dictates awaiting a case in which [an] issue was fully litigated below, so that [the Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee*, 503 U.S. at 538 (citing *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990)). For that reason, the Court routinely declines to consider claims that were not preserved in the proceedings below. *See, e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Lawn* v. *United States*, 355 U.S. 339, 362 n.168 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below."). Release Petitioners do not identify any principled basis for the Court to deviate from this regular practice – or the Court's practice of allowing issues to percolate in the lower courts before granting certiorari – in this case.

3. While Release Petitioners do not dispute their failure to preserve their new statutory claim, they make the remarkable assertion that the Second

Circuit "passed upon" the issue. Pets. Supp. Br., at 8 n.4. Contrary to their assertion, the Second Circuit did not "pass[] upon" the statutory issue that they now seek to raise.

According to Release Petitioners (*id.*), the Second Circuit passed upon the statutory issue because it (implicitly) determined that the federal common law standard properly applied to this case. The Second Circuit's failure to consider an entirely distinct statutory claim, not presented by the parties, however, plainly is not tantamount to a rejection of that claim. Under any fair reading of the Second Circuit's decision, it is clear that the Second Circuit did not pass upon the question whether ERISA's plan documents provision renders the release of disputed claims for pension benefits invalid. Accordingly, it would be inappropriate and imprudent for the Court to grant Release Petitioners' petitions.

CONCLUSION

The petitions for writs of certiorari should be denied.

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June 2009

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(8)

No. 08-810

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IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF

Petitioners submit this brief in response to the brief of the United States as *amicus curiae*.

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION.

The Second Circuit held that it had no obligation to defer to the Plan Administrator's interpretation of the Plan on remand from *Frommert I* because there was no Plan Administrator "decision" to which deference could be accorded. Pet. App. 13a. This holding carves out a broad and unwarranted exception to the rule of *Firestone* deference and conflicts with decisions of this Court and other Circuits. *See* Pet. 11-22.

The Government reaches a different conclusion based on an incorrect framing of the decisions below. According to the Government, no deference was due to the Plan Administrator's Plan interpretation on remand because the task on remand was simply to "craft[] a remedy for the administrator's ERISA violations." Br. U.S. 11. In fact, the task on remand was to interpret the remaining Plan provisions that were unaffected by the Second Circuit's finding of a technical ERISA disclosure violation.

In *Frommert I*, the Second Circuit held that the Plan did not properly disclose, and so could not apply, its "phantom account" methodology to participants until 1998. Pet. App. 51a. It then remanded for a determination of the correct offset to Respondents' benefits in light of the "ambiguous manner in which the pre-[1998] terms of the Plan"

addressed this offset question. *Id.* Furthermore, the Second Circuit rejected Respondents' claim for equitable relief because the relief Respondents sought – "recalculation of their benefits consistent with [Plan] terms" – fell "comfortably within the scope of § 502(a)(1)(B)," which allows a plan participant to sue for benefits due "under the terms of [the] plan." *Id.* 53a. Thus, the task on remand was to interpret, for the first time, the pre-1998 Plan terms – *not*, as the Government suggests, to craft an equitable remedy for an ERISA violation.

The Government makes three specific arguments that the decision below was correct, but each is undermined by the Government's erroneous characterization of the task presented on remand. First, the Government argues that trust law authorizes courts to strip plan administrators of *Firestone* deference if they make a mistake in determining the benefits due to plan participants. Second, the Government argues that no deference was due to the Plan Administrator because the Plan Administrator had previously interpreted the same Plan terms in a manner that violated ERISA. Third, the Government argues that no deference was due because the Plan terms were "silent" regarding the proper method for calculating Respondents' benefits. As demonstrated below, each of these contentions is without merit. Because this question is of great practical and precedential significance, the Court should grant the Petition.

A. Trust Law Mandates Deference To The Plan Administrator.

1. Under this Court's decisions in *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), and *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a deferential standard of review applies to a plan administrator's interpretation of plan terms to the extent provided by the plan documents and the common law of trusts. *See Glenn*, 128 S. Ct. at 2347-48. The Second Circuit's holding that no deference was due the Plan Administrator's interpretation of Plan terms conflicts with these decisions.

The Government responds that trust law permits a court to override a trustee's discretion to interpret the terms of a trust and "make its own judgment about the benefits due" to a trust beneficiary if the trustee has previously made an "[un]reasonable" or "arbitrary" decision regarding the distribution of trust assets. Br. U.S. 11-12. In the Government's view, this rationale for stripping away *Firestone* deference applies even to cases in which the plan administrator's "arbitrary" or "unreasonable" decision consists of a failure to recognize a technical ERISA disclosure violation that affects the distribution of benefits. *See supra* 1-2. The Government's reasoning likewise authorizes stripping away deference whenever a plan administrator makes an arbitrary finding of fact or unreasonably interprets plan terms. Contrary to the Government's assertion, however, trust law generally allows courts to disregard a trustee's discretionary authority only where the trustee's

conduct is marred by fraud, bad faith, or the like – circumstances that no one contends are present here.

The Government is correct that in reviewing a trustee's distribution of assets, a "court may, *in appropriate circumstances*, itself fix the amount that the trustee shall pay rather than defer to the trustee to determine a reasonable amount." Br. U.S. 11. (internal quotation marks omitted) (emphasis added). However, trust law distinguishes between merely erroneous exercises of discretion, on the one hand, and more troubling conduct, such as fraud or dishonesty, on the other. *See, e.g.*, III William F. Fratcher, Scott on Trusts § 187.1, at 27-31 (4th ed. 1988). In the former case, courts continue to defer to the trustee's judgment; only in the latter case may courts step into the shoes of the trustee. *Id.* Indeed, this Court itself has recognized that courts should not ordinarily control a trustee's discretion where "there is no *mala fides*." *Colton* v. *Colton*, 127 U.S. 300, 320-21 (1888).

Numerous other decisions likewise hold that trustees who erroneously but in good faith interpret the terms of trust instruments may not be stripped of discretion. For example, in *Eaton* v. *Eaton*, the New Hampshire Supreme Court reversed a lower court's decision fixing the amount to be paid for child support. *See* 132 A. 10, 11 (N.H. 1926). Although the court agreed that the trustee had erroneously denied support for the child *entirely*, it held that the trustee – not the court – was entitled to determine the *amount* of support due to the child. *Id.* Deference

was given to the trustee notwithstanding the trustee's earlier abuse of discretion.[1]

Here, the Second Circuit did not find that the Plan Administrator acted dishonestly or in bad faith in applying the "phantom account" offset. Rather, it held that the Plan had not properly disclosed, and so could not apply, the phantom account offset methodology until 1998. Pet. App. 50a-51a. Under these circumstances, both trust law and this Court's decisions in *Firestone* and *Glenn* require deference to the Plan Administrator's determination of the benefits due under the pre-1998 Plan terms.

The Government's contrary view presents an issue of great importance. According to the Government, once a plan administrator makes a mistake of law or unreasonably interprets an ERISA plan, a reviewing court may disregard *Firestone* deference and "make its own judgment about the

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[1] *Accord Sullivan* v. *Sullivan*, 12 N.W.2d 148, 151 (Neb. 1943) (upholding lower court's decision that trustee had improperly denied support, but reversing its decision to fix the amount of support because "the court cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act"); *Finch* v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306, 309-10 (N.C. Ct. App. 2003) (affirming lower court's finding that trustee had "abused its discretion" but vacating order to distribute funds because the trustee still had "discretion whether to disburse any funds").

benefits due." Br. U.S. 11. Such a hair-trigger rule for withdrawing deference would conflict with this Court's decisions in *Firestone* and *Glenn*, would thrust courts into the role of administering pension plans with alarming frequency, and would discourage employers from offering employee benefit plans in the first place. *See* Business Roundtable Amicus Br. 8-12.

2. In arguing that the Second Circuit's decision was correct because *Firestone* deference is no longer required after a plan administrator initially abuses its discretion, the Government underscores the conflict between the Second Circuit's decision and decisions of the Seventh and Eleventh Circuits. The latter Circuits have held that a plan administrator must be given deference in calculating benefits even after the administrator has been found to have arbitrarily and capriciously denied benefits entirely. *See Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008); *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 605-06 (7th Cir. 2008). The rule espoused by the Government – under which deference would be a matter of judicial choice in such circumstances – cannot be reconciled with these decisions.

The Government cites decisions from the First and Ninth Circuits for the proposition that courts have discretion to calculate benefits after finding that a plan administrator arbitrarily and capriciously denied benefits. Br. U.S. 11-12. The cited decisions, however, do not involve plan

interpretation, and thus are inapposite. *See* Pets. Reply Br. 12-13.[2]

The Ninth Circuit decisions, moreover, themselves recognize that, in cases in which a plan administrator "has construe[d] a plan provision erroneously and therefore has not yet had the opportunity of applying the [p]lan, properly construed," the administrator's interpretation of the "properly construed" plan is entitled to deference. *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996) (internal quotation marks omitted) (alterations in original); *see* Br. U.S. 12. Contrary to this Ninth Circuit rule, the Second Circuit here declined to defer to the Plan Administrator's interpretation of the pre-1998 Plan terms after the Second Circuit held that the phantom account offset methodology was inadequately disclosed and therefore void before 1998.

Finally, even if the Government were correct that the First and Ninth Circuit decisions are consistent with the decision below, this would only demonstrate the need for this Court to resolve a split among the First, Second and Ninth Circuits, on the one hand, and the Seventh and Eleventh Circuits, on the other.

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[2] The Government also cites a Seventh Circuit decision that is particularly off-point. *See Halpin* v. *W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992) (affirming reinstatement of disability benefits because plan's claims procedure failed to comply with ERISA's "full and fair review" requirement).

B. The Decision Below Was Not Premised On The Fact That The Plan Administrator Interpreted The "Same Terms" On Remand.

The Government also argues that the decision below is correct because this case involves a "second attempt" to interpret the "same" Plan terms. Br. U.S. 14-15. The Government is mistaken.

First, the Second Circuit did not withdraw *Firestone* deference on the ground that the Plan Administrator was giving his second-best interpretation of the same Plan terms. Pet. App. 13a. Rather, it held that no deference was due "because the plan administrator never rendered any *decision* other than the original benefit determinations, all of which were premised on the now-impermissible 'phantom-account' offset mechanism." *Id.* (emphasis added). The court rejected the Plan Administrator's interpretation of the pre-1998 Plan terms as a "mere *opinion*" offered in litigation. *Id.*

Second, it is at most rhetorically true that the Plan Administrator construed the same Plan provisions on remand as it did in its original benefits determination. Since the early 1980s, the Plan Administrator has calculated benefits of rehired employees pursuant to the phantom account methodology. *Id.* 83a-84a. The Plan Administrator, moreover, believed that this approach was supported by Plan provisions other than the non-duplication of benefits provision. *See id.* 66a-67a; 86a. In *Frommert I*, however, the Second Circuit held that the phantom account methodology was inadequately disclosed,

and was therefore void, until 1998. *Id.* 51a-52a. Accordingly, the interpretive question at issue here – *i.e.*, how the offset should be applied based on the non-duplication of benefits provision alone – arose for the first time on remand.

Third, the Second Circuit's decision cannot be meaningfully distinguished from *Oliver* and *Pakovich* on the ground that the Plan Administrator interpreted the "same terms" on remand. In those cases, the courts of appeals mandated deference to the plan administrator's benefits determination *after* the plan administrator's arbitrary and capricious denial of benefits. It cannot be right that a plan administrator who denies benefits entirely is owed continuing deference, whereas an administrator who grants benefits but miscalculates the amount is not. Thus, for purposes of applying *Firestone* deference, there is no principled way to distinguish the errors in *Oliver* and *Pakovich* from the initial error here.

C. The Plan Is Not "Silent" Regarding The Offset.

The Government – unlike Respondents – also contends that the pre-1998 Plan was "silent" regarding the proper calculation of the offset. Br. U.S. 3-4, 9, 13, 14, 16-17. This is incorrect and not what the Second Circuit held.

1. As the Second Circuit recognized in *Frommert I*, the Xerox Plan has "always contained provisions concerning the offset of prior distributions," including the non-duplication of benefits provision. Pet. App. 26a-28a. Accordingly, as the Second Circuit explained, the task on remand was to determine

under the "pre-amendment terms of the Plan" – *i.e.*, pursuant to the non-duplication of benefits provision and without reference to so-called phantom accounting – "how prior distributions were to be treated." *Id.* at 51a.

The Government asserts that the Plan is "silent" on this question and that the Second Circuit therefore "concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision), did not address how to calculate" the offset for prior distributions. Br. U.S. 9. But the Second Circuit did not hold that the pre-1998 Plan terms were "silent" regarding the calculation of the offset; it held that those Plan terms were "ambiguous." Pet. App. 51a. The court also rejected Respondents' claim for equitable relief because "adequate relief" was available from a determination of the benefits due under the terms of the pre-amendment plan. *Id.* 53a-54a.

To be sure, the Second Circuit stated in passing that the pre-1998 Plan "did not *specify* how the Plan would account for the prior distributions," *id.* 28a-29a (emphasis added), but to "specify" means "[t]o state explicitly," Webster's II New College Dictionary (3rd ed. 2005). Failure to state something *explicitly* is entirely consistent with ambiguity. And ambiguity is not a grounds to deny deference but a predicate for deference.

On remand from *Frommert I*, moreover, the District Court plainly understood its task to be interpreting the pre-1998 Plan. *See* Pet. App. 104a ("The Court's task, as directed by the Court of

Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due...."). The Government is therefore mistaken in suggesting that the courts below held that the pre-1998 Plan was "silent" with respect to the calculation of the offset.

2. There is good reason why the courts below stopped short of holding that the Plan was silent regarding the calculation of the offset. On remand from *Frommert I*, the Plan Administrator submitted a considered interpretation of the pre-1998 Plan terms. *See id.* 144a-54a. This submission makes clear that the pre-1998 Plan was *not* silent regarding the offset.

The Plan calculates benefits for re-hired employees by taking account of *all* of the employees' service to Xerox, including service rendered before their re-hire date. *Id.* 25a-26a. Thus, in the absence of an appropriate offset to take account of the distributions that rehired employees received upon their initial departures, such employees would receive double credit for their initial service. *See* Pet. 5. The Plan's non-duplication of benefits provision is what prevents such double payments.

That provision states that the final retirement benefit of a rehired employee "shall be offset by the *accrued benefit* attributable to such distribution." Pet. App. 141a (emphasis added). The term "accrued benefit" is defined by the Plan, in pertinent part, as "[t]he normal retirement benefit which a [participant] has earned up to any date, and which is payable at Normal Retirement Date" – *i.e.*, as an age

65 annuity – "computed in accordance with ... Section 4.3." *Id.* 134a; 148a. Section 4.3, in turn, specifies that the annuity benefit attributable to a retirement account balance must be calculated "using annuity rates established by the PBGC." *Id.* 141a; 150a.

Based upon these provisions, the Plan Administrator interpreted the Plan to require an offset in an amount equal to the annuity that could have been purchased with the participant's prior lump sum distribution using interest rates specified by the PBGC. *Id.* 148a-50a. This interpretation is amply supported by the terms of the pre-1998 Plan, especially when *Firestone* deference is accorded to the Plan Administrator.

3. Even were the Government correct that the Plan was "silent" regarding the offset calculation, this would not justify withholding deference from the Plan Administrator. As the Seventh Circuit has recognized, it "is implicit in the idea of deferential review" that where "the plan document does not furnish the answer to [a] question, the answer given by the plan administrator ... will ordinarily bind the court." *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 922 (7th Cir. 1996). Thus, as *Gallo* recognizes, silence is not a reason to deny deference but a circumstance requiring it.

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION.

The Second Circuit compounded its error of refusing to accord deference to the Plan Administrator by deferring to the District Court's so-called "allowable discretion" to interpret the Plan on remand. Pet. 29-33. This was a fundamental error: the District Court was obliged to interpret the Plan *correctly* – not just "reasonably" – on remand. The Government's only response is that "allowable discretion" was warranted because "the district court *was not interpreting plan terms* when it fashioned the remedy here, because the plan was *silent* about how to calculate the offset." Br. U.S. 13 (emphasis added). As discussed above (at 1-2, 9-12), that is not correct and is not what the Second Circuit held.

The novel standard of review that the Second Circuit applied to the District Court's interpretation of plan terms exposes employers to the troubling prospect that district courts may adopt any interpretation of a plan that is not "unreasonable" in the course of awarding a remedy in an ERISA case. If this were the law, different district courts could adopt conflicting interpretations of the very same plan, and ERISA's goal of promoting uniform and consistent administration of benefit plans would be thwarted. Pet. 33-34. The Petition should be granted to correct this important error. In the alternative, because the Second Circuit's failure to apply the proper standard of review clearly departed from settled law, summary reversal is warranted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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June 2009

Nos. 08-803, 08-810 and 08-826

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KENNETH PIETROWSKI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals applied correct standards of review in this denial-of-benefits case under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, when it concluded that:

   (a) the administrator of an ERISA plan whose denial of benefits violated ERISA was not entitled to deference regarding its opinion on how to remedy the violation, and

   (b) the district court's choice of remedy should be reviewed for abuse of discretion.

2. Whether the court of appeals applied correct legal principles in holding that employees who signed general releases knowingly and voluntarily waived their claims under ERISA.

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In the Supreme Court of the United States

No. 08-803

MATTHEW D. ALFIERI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

No. 08-810

SALLY L. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

No. 08-826

KENNETH PIETROWSKI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for a writ of certiorari should be denied.

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, the administrator of an employee benefit plan must give plan participants a summary plan description (SPD) that "shall be sufficiently accurate and comprehensive to reasonably apprise [them] of their rights and obligations under the plan." 29 U.S.C. 1022(a). The SPD must provide notice of, among other things, "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. 1022(b). ERISA also generally requires the administrator of a pension plan to give participants prior written notice of any plan amendment that significantly reduces the rate of future benefit accrual. 29 U.S.C. 1054(h). And ERISA's anti-cutback provision prohibits amendments that decrease benefits that have already accrued. 29 U.S.C. 1054(g).

2. This case was brought by employees of Xerox Corporation who are participants in the Xerox Corporation Retirement Income Guarantee Plan (the Plan), an ERISA-covered pension plan that is a petitioner in No. 08-810. Pet. App. 24a-25a.[1] The employees were rehired by Xerox after previously leaving the company and receiving lump-sum distributions of pension benefits that they had accrued before their departures. *Id.* at 25a. The employees claim that the Plan and its administrators (the other petitioners in No. 08-810) violated ERISA by using a "phantom account" method to calculate the amount by which the employees' current pension benefits are offset to reflect their prior distributions. *Id.* at 75a. In essence, the phantom account

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 08-810.

method reduces an employee's current benefits to reflect not only the actual amount of the prior distribution, but also hypothetical investment gains that the distribution would have earned if it had remained in the employee's pension account and been invested. *Id.* at 5a.

The employees sued the Plan and its administrators under ERISA Section 502(a)(1)(B) and (3), 29 U.S.C. 1132(a)(1)(B) and (3). The employees argued that, until the Plan and the SPD were amended in 1998, the Plan did not provide for use of the phantom account method to calculate the offset for the distributions they previously received, and that the SPD did not disclose that the phantom account method would be used. Pet. App. 75a, 81a-82a. The employees contended that the Plan and its administrators had therefore violated ERISA's SPD, notice, and anti-cutback provisions. *Id.* at 75a-76a.

The district court granted summary judgment in favor of the Plan and its administrators. Pet. App. 61a-98a. As relevant here, the court accepted their argument that "the Plan has always provided for the challenged offset" and that the 1998 amendments only made express what the pre-1998 plan terms implicitly provided. *Id.* at 75a; see *id.* at 79a-93a.

3. The court of appeals vacated the district court's decision in relevant part. Pet. App. 22a-60a. The court of appeals found that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, *id.* at 26a-28a, until 1998, the Plan did not address how to calculate the offset for the distributions received by the plaintiff employees. See *id.* at 28a-29a ("[T]he 1989 Restatement" of the Plan "did not specify how the Plan would account for the prior distributions."); *id.* at 37a ("Not until 1998, when the phantom account was fully explained in an SPD, was

the text of the Plan amended and adequate information provided to former Xerox employees concerning the treatment of their previous distributions."). The court observed that it had already held, in *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001), that earlier versions of the Plan violated ERISA's SPD requirement by failing to "provide notice" that participants' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." Pet. App. 43a-44a (quoting *Layaou*, 238 F.3d at 210). Accordingly, the court held "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary and capricious standard" of review. *Id.* at 44a. The court further held that the Plan's efforts to apply the phantom account method before issuance of the 1998 SPD violated the requirement in Section 1054(h) that plans provide advance notice of amendments that significantly reduce the rate of future benefit accrual, *id.* at 49a, and that application of the phantom account method to employees rehired before 1998 impermissibly reduced accrued benefits in violation of Section 1054(g), *id.* at 50a.

The court of appeals remanded the case for the district court to craft a remedy for those ERISA violations, "utiliz[ing] an appropriate pre-amendment calculation to determine [employees'] benefits." Pet. App. 51a. Noting "the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated," the court of appeals suggested that the district court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Ibid.*

4. On remand, the district court determined that the plaintiff employees' benefits should be calculated by

subtracting the actual amount of prior distributions without adjustment for hypothetical investment gains or losses. Pet. App. 102a-108a. Noting that the pre-1998 plan terms said "virtually nothing" about how to account for prior distributions, *id.* at 104a, the court reasoned that deducting the actual amount of the distributions is straightforward, adequately prevents employees from receiving a windfall, and "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." *Id.* at 107a. The court rejected testimony that "focused on the appropriate economic, financial and actuarial methods for treating prior distributions," stating that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing." *Id.* at 104a.

The district court also concluded that 22 of the plaintiff employees, 18 of whom are petitioners in Nos. 08-803 and 08-826, were entitled to relief even though they had signed general releases when their employment was terminated through reductions in force that occurred during the litigation. Pet. App. 109a-121a.[2] The court reasoned that plan participants may waive ERISA claims, but a waiver must be knowing and voluntary and is subject to closer scrutiny than a waiver of general contract claims. *Id.* at 112a-113a. Applying a "totality of the circumstances" test previously adopted by the court of appeals, the district court concluded that although some considerations weighed in favor of uphold-

[2] The four release signers who are not petitioners in Nos. 08-803 or 08-826 altered their releases to exclude their claims in this litigation, and the Plan and its administrators conceded that their claims are not barred. Pet. App. 14a n.4, 111a.

ing the releases, they should not be given effect because of deficiencies in the "clarity of the release[s] and the consideration given by Xerox in exchange for the releases." *Id.* at 113a-114a (citation omitted).

In particular, the district court found that the releases were ambiguous because although they stated that they covered "any and all claims," including ERISA claims, they also stated that the consideration for the releases was "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." Pet. App. 114a (citation omitted). The court concluded that the latter language could be read to preserve the employees' rights to pension benefits calculated without a "phantom account" reduction because the court of appeals had held that the employees were "entitled by law" to those unreduced benefits. *Id.* at 115a-116a. The district court also stated that the failure of the releases to comply with requirements in the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f)(1), which governs waivers of claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was "some evidence" that the waivers were not knowing and voluntary. Pet. App. 116a n.5.

5. The court of appeals upheld the district court's choice of a remedy for the ERISA violations, but vacated the district court's holding that the releases were unenforceable. Pet. App. 1a-21a.

The court of appeals reviewed the district court's choice of remedy for abuse of discretion. Pet. App. 8a. The court of appeals concluded that the Plan and its administrators had failed to establish that the district court's approach "violated either the Plan terms or any law." *Id.* at 9a. The court also rejected their arguments that the district court erred by not adopting an approach

that would have treated the plaintiffs as newly hired employees, by not remanding the remedy issue to the plan administrator, and by failing to defer to the administrator's approach. *Id.* at 9a-14a.

In addressing the deference due the administrator's approach, the court of appeals recognized that where an ERISA plan gives the administrator discretionary authority to construe plan terms, a district court should review the administrator's decision "under an excess of allowable discretion standard." Pet. App. 12a. The court of appeals concluded, however, that the deference principle did not apply to the remedial determination in this case because the district court had no "decision" to review. *Id.* at 13a. The court of appeals explained that the Plan and its administrators had identified "no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." *Ibid.* Because the Plan "addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence," the court saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

Turning to the releases signed by the petitioners in Nos. 08-803 and 08-826, the court of appeals held that the releases were enforceable. Pet. App. 14a-21a. It rejected the district court's view that the releases were ambiguous, explaining that the district court had "conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." *Id.* at 18a. The court of appeals concluded

that the language in which the district court had found ambiguity (see p. 6, *supra*) "provided only that the consideration for the release[s], *i.e.*, the salary continuance[s], did not replace any benefits, including pension benefits, to which the employee[s] w[ere] already entitled." Pet. App. 19a. Noting that the employees had not alleged that Xerox had violated that provision by denying them pension benefits based on the salary continuances, the court concluded that uncertainty over the amount of benefits when the releases were signed did not render them unenforceable. *Id.* at 19a-20a.

The court of appeals then applied the "totality of the circumstances" test articulated in circuit precedent and, based on "the undisputed facts," determined that the releases were knowing and voluntary. Pet. App. 20a-21a. The court stated that it need not decide whether the releases complied with the OWBPA because that statute is irrelevant to ERISA claims. *Id.* at 18a n.5.

DISCUSSION

The court of appeals correctly upheld the district court's choice of remedy for the ERISA violations committed by the petitioners in No. 08-810 (the Xerox petitioners), and the court of appeals' rulings on the remedy issue do not conflict with any decision of this Court or another court of appeals. This Court's review of the uestions presented in No. 08-810 is therefore not warranted. Nor is review warranted of the court of appeals' holding that the petitioners in Nos. 08-803 and 08-826 (the release petitioners) validly released their ERISA claims. Contrary to the release petitioners' contentions, the court of appeals did not adopt a new standard for assessing the enforceability of releases of ERISA claims, reject the applicability of common law principles

in ERISA cases, or erroneously fail to apply OWBPA standards. And the court's decision on the release issue is consistent with decisions of this Court and other courts of appeals. Accordingly, this Court should deny all three petitions for a writ of certiorari.

A. The Issues In No. 08-810 Do Not Warrant This Court's Review

1. a. Contrary to the contentions of the Xerox petitioners (Pet. 11-12, 17-22), the court of appeals correctly held that the district court was not required to defer to the plan administrator's views on the appropriate remedy for the ERISA violations committed by the administrator and the Plan. When the district court crafted that remedy, the court of appeals had already concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision) did not address how to calculate the amount by which the plaintiff employees' benefits should be offset to account for their prior distributions. Pet. App. 28a-29a, 37a. The court of appeals had also already held that the Plan's failure to specify an offset method and the administrator's efforts to impose the phantom account method violated ERISA's SPD and notice requirements, *id.* at 43a-51a, and that the administrator had arbitrarily and capriciously interpreted the pre-1998 plan terms to incorporate the phantom account method, *id.* at 44a. See pp. 3-4, *supra*. In those circumstances, the district court had no obligation to defer to the administrator's newly-minted assertion that the same pre-1998 plan terms provided for a different offset method. On the contrary, because the court of appeals had determined that the plan terms were silent on the appropriate offset method, the district court had discretion to select a reasonable method in the exercise of

its discretion to craft an appropriate remedy for the ERISA violations. See Pet. App. 12a-14a.[3]

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989) (*Firestone*), this Court held that courts should be "guided by principles of trust law" when they "determin[e] the appropriate standard of review" for decisions in actions, like this one, challenging benefits determinations under 29 U.S.C. 1132(a)(1)(B). Based on trust principles, the Court further held that a benefits decision by a plan administrator is reviewed de novo, unless the administrator is exercising discretion conferred by the plan to determine eligibility for benefits or to construe the plan terms, in which case abuse-of-discretion review applies. *Firestone*, 489 U.S. at 111-115. In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), this Court reaffirmed *Firestone*'s approach, relying on trust law in concluding that a reviewing court should consider an administrator's conflict of interest as one "of several different, often case-specific, factors" that are "weigh[ed] all together" to determine the lawfulness of the administrator's action. *Id.* at 2351 (citing,

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[3] The district court's decision not to defer to the administrator's proposed offset method was particularly reasonable given that this method was only one of two alternative approaches that the Xerox petitioners advanced on remand. See 08-810 Pet. C.A. Br. 6, 16, 33-36 (discussing alternative "new hire" approach); C.A. App. A113 (same). The Xerox petitioners' contention that the court erred in declining to defer to the plan administrator's method thus cannot be reconciled with their own advocacy of a different method. Moreover, the Xerox petitioners did not clearly and timely ask the district court to defer. Compare 08-810 Pet. Pre-Hearing Br. Addressed to Remedies (failing to ask for deference) and C.A. App. A389, A395 (appearing to agree with district court that deference not warranted) with 08-810 Pet. Pre-Hearing Reply Br. Addressing Remedies 2 (asking for deference).

inter alia, Restatement (Second) of Trusts § 187 cmt. d at 403 (1959) (Second Restatement)).

The court below acted consistently with trust law in holding that the district court was not required to defer to the plan administrator's preferred approach to the offset issue when crafting a remedy for the administrator's ERISA violations. Even where a trustee has discretion to determine the benefits of a trust beneficiary, a "court will control the trustee in the exercise of [that] power" if the trustee makes an "arbitrary decision" or acts "beyond the bounds of a reasonable judgment." Second Restatement § 187 cmts. h and i; see 2 Restatement (Third) of Trusts § 50 & cmt. b (2003) (Third Restatement); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 187, 187.2, 187.3 (4th ed. 1988) (Scott). "Where the court finds that there has been [such] an abuse of a discretionary power, the decree to be rendered is in its discretion." George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 560, at 222 (rev. 2d ed. 1980) (Bogert). In exercising that discretion, the court may, if the circumstances warrant, make its own judgment about the benefits due and order payment by the trustee. See *id.* at 223. Thus, the court may, in appropriate circumstances, "itself fix the amount" that the trustee shall pay rather than defer to the trustee to determine a reasonable amount. Scott § 187.1, at 28; see Third Restatement § 50 cmt. b at 261; Bogert § 560, at 223 n.19 (giving examples); see, *e.g.*, *Colton* v. *Colton*, 127 U.S. 300, 322 (1888).

In accord with these principles and the decision below, other courts of appeals have held that "[o]nce a court finds that an administrator has acted arbitrarily and capriciously in denying a claim for benefits, the court can either remand the case to the administrator

for a renewed evaluation of the claimant's case, or it can award a retroactive reinstatement of benefits." *Cook* v. *Liberty Life Assurance Co.*, 320 F.3d 11, 24 (1st Cir. 2003). See, *e.g.*, *Halpin* v. *WW. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992). "[T]he principle of ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately." *Cook*, 320 F.3d at 24. Thus, a court is not required in all cases to allow the administrator a second opportunity to determine the appropriate level of benefits when the court has determined that the administrator acted arbitrarily in construing plan language. See, *e.g.*, *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996), cert. denied, 520 U.S. 1118 (1997). Reconsideration by the administrator may be appropriate in some cases where the administrator simply failed adequately to explain its reasoning or where the correct determination of benefits will depend on the construction of plan language that actually addresses the issue but is ambiguous. See *Grosz-Salomon* v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001). Here, however, the administrator's initial interpretation had already been found unreasonable and in violation of ERISA, and a correct determination did not depend on construing ambiguous plan terms because the plan said "virtually nothing" about how to calculate an offset. Pet. App. 104a.

b. For similar reasons, the Xerox petitioners are also incorrect in asserting (Pet. 28-33) that the court of appeals applied the wrong standard in reviewing the district court's choice of remedy. Because a district court has discretion to fashion the appropriate remedy when a trustee has abused his authority, a court of appeals should review the district court's choice of remedy in

such circumstances for abuse of discretion. That approach accords with principles of trust law, under which courts of appeals review a district court's choice of equitable remedies for abuse of discretion. See *United States* v. *Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008); *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG* v. *E-Systems, Inc.*, 257 F.3d 461, 469 (5th Cir. 2001). And it is consistent with the case law under ERISA. See, *e.g.*, *Cook*, 320 F.3d at 24 ("An appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion."); *Downie* v. *Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168, 1170 (10th Cir. 1991) (same).

Contrary to the Xerox petitioners' contention (Pet. 28), application of abuse-of-discretion review in this case does not conflict with the rule that judicial review of interpretations of written instruments is generally de novo. Nor does applying abuse-of-discretion review here authorize district courts to adopt conflicting interpretations of the same plan language. Pet. 33. As discussed above, the district court was not interpreting plan terms when it fashioned the remedy here, because the Plan was silent about how to calculate the offset for the prior distributions. See pp. 3-4, 9, 12, *supra*; Pet. App. 13a, 28a-29a, 37a, 104a.[4]

[4] The Xerox petitioners are mistaken in asserting (Pet. 26-27) that *Miller* v. *Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007), required the plan administrator to use the offset method that the administrator advocated on remand in this case. The Ninth Circuit in *Miller* held that using the phantom account method to offset benefits violated ERISA because it reduced pension benefits by more than the accrued benefit attributable to earlier distributions. *Id.* at 872, 874. Although the court stated that "the offset *permitted*" was "one based on the actual actuarial equivalent" of the prior distribution, *id.* at 876 (emphasis added), the court did

2. a. The Xerox petitioners err in contending (Pet. 12, 17-22) that the decision below conflicts with this Court's decisions in *Firestone* and *Glenn*. That contention is based on the incorrect premise that the court of appeals held "that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process." *Id.* at 12. The court made no such holding. Instead, the court held that deference to the administrator's opinion on the appropriate offset method was not required because "the administrator had previously construed the same terms" and the court had "found such a construction to have violated ERISA." Pet. App. 13a. Moreover, the court of appeals had already determined that those terms did not address the offset method. *Id.* at 13a, 28a-29a, 37a. Neither *Firestone* nor *Glenn* addresses whether a plan administrator is due deference when the administrator proposes a new interpretation of plan terms that the administrator previously construed arbitrarily and capriciously and in violation of ERISA. Nor do they address whether deference is due when a court has already determined that the plan terms do not speak to the relevant issue.

b. For similar reasons, the Xerox petitioners are incorrect in contending (Pet. 12-17) that the court of ap-

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not *require* the plan to offset benefits by an actuarial equivalent rather than only the actual amount of the prior distributions, much less require use of the particular actuarial equivalent proposed by the administrator on remand in this case. Nor did the court in *Miller* consider whether the ERISA violations found in this case, including the SPD and notice violations, might weigh against adoption of an offset based on any amount greater than the actual amount of prior distributions. See Pet. App. 104a (district court's conclusion that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing").

peals' deference ruling conflicts with decisions of other courts of appeals. Most of the cases cited by the Xerox petitioners involve the application by courts of appeals of deferential review to a plan administrator's interpretation of plan provisions even though that interpretation was not expressed through a decision on a benefits claim. See *Administrative Comm. of Wal-Mart Assoc. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004); *Worthy* v. *New Orleans S.S. Ass'n*, 342 F.3d 422, 427-428 (5th Cir. 2003); *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000); *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 448 (3d Cir.), cert. denied, 531 U.S. 1037 (2000); *Moench* v. *Robertson*, 62 F.3d 553, 566-567 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996); see also *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985). Because the decision below does not hold that a plan administrator receives deference only for an interpretation expressed through a decision on a benefits claim, it does not conflict with those decisions. In addition, unlike the decision below, the decisions from the other circuits do not involve an administrator's second attempt to apply plan provisions after a court has rejected its previous interpretation as arbitrary and capricious and in violation of ERISA and has determined that the plan terms are silent on the relevant issue.

The other cases on which the Xerox petitioners base their claim of a conflict likewise do not involve these circumstances. In *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-1354 (2008), the Eleventh Circuit held that a plan administrator had erroneously determined that a participant was not entitled to disability benefits. The court remanded the case to the district court for calcula-

tion of the benefits due, with instructions to allow the plan administrator to offer an interpretation of a plan term providing for plan benefits to be offset by Social Security benefits and to review the administrator's interpretation under the deferential standard articulated in *Glenn*. *Oliver* is consistent with the decision below because, when the Eleventh Circuit remanded *Oliver*, it had neither rejected the administrator's interpretation of the relevant plan provision nor determined that the provision was silent on the relevant issue. On the contrary, the Eleventh Circuit had held in a related case that the administrator's construction of the provision was reasonable. See *ibid.* (citing *White* v. *Coca-Cola Co.*, 542 F.3d 848, 853-857 (11th Cir. 2008), cert. denied, No. 08-991 (Apr. 6, 2009)).

The decision below is likewise consistent with *Pakovich* v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008). In *Pakovich*, a plan administrator denied a claim for disability benefits on the ground that a claimant was not totally disabled from her own occupation, as required to obtain benefits for 24 months, without deciding whether she was unable to work at any occupation, as required to obtain benefits beyond 24 months. *Id.* at 602. The district court reversed the "own occupation" determination but went on to find that the claimant was not disabled from all occupations and therefore was not entitled to benefits beyond 24 months. *Ibid.* The court of appeals held that because the plan administrator had not addressed the "all occupations" issue, the matter should have been remanded to the administrator to address that issue in the first instance. *Id.* at 602, 607. That holding is consistent with the decision below because, in *Pakovich*, the administrator had not previously interpreted the relevant plan provisions and the court

had neither already rejected the administrator's interpretation nor determined that the provisions did not address the relevant issue.[5]

3. The Xerox petitioners are also mistaken in contending (Pet. 29-32) that the court of appeals created a circuit conflict by reviewing the district court's choice of remedy for abuse of discretion. All but one of the cases on which the Xerox petitioners rely are non-ERISA decisions applying de novo review to interpretations of written documents. *FDIC* v. *Brants*, 2 F.3d 147, 150 (5th Cir. 1993); *Barrett* v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976); *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F.2d 770, 773 (3d Cir. 1972); *NLRB* v. *Hobart Bros. Co.*, 372 F.2d 203, 206 (6th Cir. 1967); *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948). None addressed the appropriate standard for reviewing a district court's choice of remedy for an ERISA violation. The only ERISA case cited by the Xerox petitioners, *Welsh* v. *Burlington Northern, Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995), also did not discuss what standard applies to review of a district court's choice of

[5] The decision below is also consistent with *Gallo* v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) (see Pet. 23-24 n.8). In *Gallo*, the Seventh Circuit held that an administrator could defend its interpretation of a plan with arguments that the administrator had not presented when denying the claim for benefits. *Id.* at 922-923. In dicta, the court stated that even if an administrator failed fully to explain the basis for its interpretation in judicial proceedings, the court would have to remand the case to the administrator unless a denial of benefits would clearly be unreasonable. *Id.* at 923. The dicta in *Gallo* is inapposite here because the Xerox administrator had already offered a full interpretation of the plan provisions, and the court of appeals had rejected that interpretation and determined that the provisions were silent on the relevant issue.

ERISA remedy. The court in *Welsh* appears to have applied de novo review in upholding a district court's computation of benefits under a plan that allowed an offset for benefits received under the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 54 F.3d at 1340-1342. But the benefits decision turned on interpretation of a plan phrase, "primary amount of payment," and there is no indication that the administrator had previously interpreted that phrase or that the Eighth Circuit had rejected its interpretation. See *id.* at 1341. The court in *Welsh* therefore had no occasion to address the standard for reviewing a district court's calculation of benefits where, as here, the plan is silent on the relevant issue, the plan administrator had previously expressed a view on the issue, and the court of appeals had rejected that position as arbitrary and capricious and in violation of ERISA.

Accordingly, the issues presented in No. 08-810 do not warrant this Court's review.

B. The Issues In Nos. 08-826 And 08-803 Do Not Warrant This Court's Review

The issues presented in Nos. 08-826 and 08-803, which challenge the court of appeals' decision that the release petitioners knowingly and voluntarily waived their ERISA claims, also do not warrant this Court's review.

1. The courts of appeals generally require that releases of rights under ERISA be knowing and voluntary and assess the validity of releases according to the totality of the circumstances. See, *e.g.*, *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181-182 (1st Cir. 1995); *Leavitt* v. *Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). The court below similarly

required the releases here to be knowing and voluntary and applied a "totality of the circumstances" test to make that determination. Pet. App. 16a-17a, 20a-21a. There is no reason for this Court to revisit that fact-bound application of settled law to the circumstances of this case.

2. The release petitioners in No. 08-826 argue (Pet. 9-20) that the court of appeals effectively created a new "group" standard by failing to apply the "totality of the circumstances" test separately to each individual who signed a release. The 08-826 petitioners do not, however, dispute the Xerox petitioners' assertion that they failed to submit any individualized facts in the district court or to argue in the court of appeals that additional factual development was required. See 08-803 & 08-826 Br. in Opp. 12, 14-15. In light of that failure, the court below cannot be faulted for not considering the individual circumstances of each person who signed a release.

3. The release petitioners in No. 08-803 argue (Pet. 9, 11-14) that the court of appeals erroneously failed to apply federal common law principles in considering the validity of the releases. They contend that the court should have invalidated the releases based on principles requiring employer-drafted documents to be strictly construed against the drafter, subjecting waivers of pension claims to closer scrutiny than waivers of general contract claims, precluding enforcement of releases that were the product of extreme economic pressure, and directing that the SPD controls if it conflicts with a plan document. *Id.* at 11-14.

At bottom, that argument is merely a case-specific disagreement with the court of appeals' conclusion that the releases clearly waived the release petitioners' ERISA claims. See 08-803 Pet. 14. That court's deci-

sion is not reasonably read as a holding that federal common law principles do not apply in ERISA cases. As petitioners acknowledge, the court of appeals has applied the strict construction, close scrutiny, and SPD principles in prior cases. See 08-803 Pet. 12-13 (citing Second Circuit cases). The court did not reject those principles here, but rather simply concluded that the releases were knowing and voluntary. Pet. App. 16a-20a. The court's holding that the waivers were knowing and voluntary appears to have been based on a conclusion that the language of the releases was sufficiently clear to preclude reliance on the common law principles cited by the 08-803 petitioners. See *id.* at 20a; accord *Smart*, 70 F.3d at 178-181 (recognizing federal common law principles but upholding severance agreement that the court found clearly included release of ERISA benefits). Whether the release language was, in fact, sufficiently clear to support the decision below is a fact-bound question that does not warrant this Court's attention.

The 08-803 petitioners also contend (Pet. 15-18) that the court of appeals erred by failing to apply to the ERISA claims here OWBPA standards for determining when a release is knowing and voluntary under the ADEA. As the 08-803 petitioners acknowledge (Pet. 15), however, the OWBPA "imposes specific requirements for releases covering ADEA claims," *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 424 (1998)—not ERISA claims. See 29 U.S.C. 626(f)(1). The courts of appeals that have addressed the question agree that the OWBPA's requirements do not apply to releases of ERISA claims. *Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 375-376 (5th Cir. 2002); *Madrid* v. *Phelps Dodge Corp.*, 211 Fed. Appx. 676, 680 (10th Cir. 2006).

The conclusion of the court below that the OWBPA is irrelevant to this case, Pet. App. 18a n.5, is consistent with those decisions. Review of the OWBPA issue is therefore not warranted.

4. Finally, contrary to the release petitioners' contention in their supplemental brief (08-803 & 08-826 Pet. Supp. Br. 3-10), *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009), provides no basis for either plenary review or vacating the decision below and remanding for further proceedings. In *Kennedy*, the Court held that a plan administrator was not required to give effect to a beneficiary's waiver of benefits due to her under the plan, because to do so would be contrary to ERISA's statutory requirement, in 29 U.S.C. 1104(a)(1)(D), that a plan shall be administered in accordance with the terms of plan documents. See 129 S. Ct. at 875. *Kennedy* may not govern the validity of the releases in this case. Unlike the waiver of benefits in *Kennedy*, the releases here purport to cover claims against the plan and its administrator, and the release petitioners' entitlement to benefits was in dispute when they signed the releases. In any event, the release petitioners did not raise a *Kennedy*-type claim in the courts below, and those courts did not address any such claim. Indeed, contrary to their new argument based on *Kennedy* that the releases are barred by statute, the release petitioners repeatedly argued below that federal common law governs the validity of releases of ERISA claims, and they sought this Court's review of whether the decision below "contravenes principles of contract interpretation under federal common law." 08-803 Pet. i. Accordingly, the release petitioners' *Kennedy* claim is not properly before this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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